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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 708

JOE T. PATTERSON, ET AL. *Petitioners*,

vs.

SAMUEL BAILEY, ET AL. *Respondents*.

PETITION OF CITY OF JACKSON; ALLEN THOMPSON, DOUGLAS L. LUCKEY AND THOMAS B. MARSHALL, COMMISSIONERS OF THE CITY OF JACKSON, AND W. D. RAYFIELD, CHIEF OF POLICE OF THE CITY OF JACKSON, AND JACKSON MUNICIPAL AIRPORT AUTHORITY, A PUBLIC BODY CORPORATE, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Petitioners, some of the Appellees in the Court below, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on September 24th, 1963, followed by the Order of said Court denying a Petition for Rehearing entered on November 8th, 1963.

Jurisdiction and Opinions Below

The basis for the jurisdiction of the courts below was 28 *U.S.C. 1343(3), 28 U.S.C. 2281* and *28 U.S.C. 2284*, the Complaint further alleging that the action was authorized

by 42 U.S.C. 1983, the action being one for alleged deprivation of rights under the Fourteenth Amendment to the Constitution of the United States. A Three-Judge Court was organized under 28 U.S.C. 2284.

An Order of the Three-Judge Court retaining jurisdiction but staying further proceedings awaiting State Court actions or decisions was entered November 17th, 1961 (R. 705). A copy thereof is submitted as Appendix "A".[1] A copy of the Opinion of the Three-Judge Court (R. 630), reported 199 F. Supp. 595, is submitted as Appendix "B". A copy of the Dissenting Opinion (R. 667) is submitted as Appendix "C".

An appeal was taken to this Court pursuant to 28 U.S.C. 1253 (R. 706). Pending the appeal a Motion was filed in this Court for an injunction to stay the prosecution of criminal cases in the Courts of Mississippi. The Motion for injunctive relief pendente lite was denied by this Court on December 18th, 1961, the Opinion being reported in 368 U.S. 346, 7 L.ed.2d 332. A copy thereof is submitted as Appendix "D".

On the appeal to this Court the Judgment of the Three-Judge Court was vacated, this Court holding that the Three-Judge Court was unnecessary, and the cause was remanded to the District Court by decision of February 26th, 1962, reported 369 U.S. 31, 7 L.ed.2d 512. Copy thereof is submitted as Appendix "E".

The District Court of the United States for the Southern District of Mississippi, Jackson Division, entered a Findings of Fact, Conclusions of Law, and Declaratory Judgment on May 3rd, 1962 (R. 732). The Opinion and Declaratory Judgment is not published and a copy thereof is submitted as Appendix "F".

[1] Appendices, because voluminous, are separately printed and presented herewith under Rule 23(1).

An oral amendment to the Findings of Fact was made by the District Judge on May 31st, 1962 (R. 843-5), not published, and a copy thereof is submitted as Appendix "G".

On July 25th, 1962, the District Court entered Supplemental Findings of Fact, Conclusions of Law and Declaratory Judgment (R. 785), not published. A copy thereof is submitted as Appendix "H".

On August 24th, 1962, there was entered in the District Court below an Order sustaining in part and overruling in part Plaintiff's Motion that the Court amend its Supplemental Findings of Fact, Conclusions of Law and Declaratory Judgment (R. 846). It has not been published and a copy thereof is submitted as Appendix "J". The Opinion of the Court which formed the basis thereof, also dated August 24th, 1962, is in letter form (R. 850) and unpublished. A copy thereof is submitted as Appendix "I".

The Decision of the District Court for the Southern District of Mississippi, Jackson Division, was reversed by the Fifth Circuit Court of Appeals on September 24th, 1963. The Opinion is reported in 323 F.2d 201. Copy of the Opinion is submitted as Appendix "K". Copy of the Judgment of said Court is submitted as Appendix "L".

A Petition for Rehearing was denied by the Court of Appeals of the Fifth Circuit without opinion on November 8th, 1963. Copy of the Order is submitted as Appendix "M".

The Order of the Court below staying the mandate for sixty days, dated November 15th, 1963, is submitted as Appendix "N".

Jurisdiction.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

The specific questions presented are:

1. Whether the three Respondents, Samuel Bailey, Joseph Broadwater and Burnett L. Jacob, have any right to maintain a class action on behalf of other Negroes when they themselves have admittedly not been discriminated against on account of their race by Petitioners and have not been deprived by them of any rights under the Fourteenth Amendment to the Constitution and where they are thus not members of the class for which relief was sought.

2. Whether under the facts of this case Respondents, although personally entitled to non-discriminatory use of transportation facilities, which they obtained by Declaratory Judgment in the District Court, were entitled to injunctive relief either personally or for a class against enforcement of Segregation Statutes of the State of Mississippi or Ordinances of the City of Jackson.

3. Whether under the facts of this case Respondents, although personally entitled to non-discriminatory use of transportation facilities which they obtained by Declaratory Judgment in the District Court, were personally or for a class entitled to broad sweeping injunctive relief against any policy, practice, custom or usage of segregation of transportation facilities by Petitioners allegedly under color of the "Breach of the Peace" statutes of the State of Mississippi.

4. Whether Respondents were entitled in this Civil Rights action to any injunctive relief against the City of Jackson or the Jackson Municipal Airport Authority, a public body corporate.

The serious underlying questions involved include: (1) Whether or not our established jurisprudence applicable

to injunctive relief and class suits is now totally inapplicable in civil rights cases; (2) Whether a city by injunction against all of its law enforcement officers can be forbidden to prevent disorderly conduct and breaches of the peace where a Negro is involved on penalty of its right to so do in individual instances being triable in a Federal Court in Contempt of Court proceedings with the risk of criminal punishment for a possible error of judgment on the part of the police officers. The necessity for local police control during racial demonstrations has been amply demonstrated; and (3) Whether an individual Negro has a personal right under the Fourteenth Amendment not only to the use of any public facility he desires but whether he also has a constitutional right to the use of completely integrated facilities.

Statement

Three individual Negroes, Respondents here, filed a Complaint in the United States District Court for the Southern District of Mississippi, Jackson Division, on behalf of all other Negroes similarly situated, against the Attorney General of the State of Mississippi; the City of Jackson and the Mayor and Commissioners thereof and the Chief of Police thereof; the Jackson Municipal Airport Authority; the Continental Southern Lines; Southern Greyhound Lines; Illinois Central Railroad; Jackson City Lines; and Cicero Carr, operator of a restaurant at the Jackson Municipal Airport.

Respondents alleged that Negroes had been deprived of rights under the Fourteenth Amendment to the Constitution of the United States by the Defendants below and sought both preliminary and permanent injunctions against said Defendants enjoining them from:

"A" Enforcing certain Segregation Statutes of the State of Mississippi; i.e. Sections 2351; 2351.5, 2351.7, 7784; 7785,

7786, 7786-01, copies of which are separately submitted as Appendix "O", together with a 1956 Ordinance of the City of Jackson, copy of which is submitted as Appendix "P". It was alleged that said Statutes require segregation of facilities of carriers and that they violated the Fourteenth Amendment to the Constitution.

(B) Enforcing any policy, practice, and custom and usage of segregating passengers of any facility of a public carrier and any policy, custom or usage of harrassing or intimidating Negroes in the exercise of their Federally protected right to use interstate and intrastate transportation facilities and services without discrimination or segregation, the Complaint alleging that Defendants in so doing were acting under color of the "Breach of the Peace" Statutes of Mississippi, i.e. Section 2087.6, 2087.7 and 2089.5, copies of which are submitted as Appendix "Q" herewith.

(C) Posting or permitted to be posted signs designating separate facilities in or on any terminal or sidewalk surrounding the same.

The Court of Appeals of the Fifth Circuit acting through Circuit Judges Wisdom and Hayes, Circuit Judge Cameron dissenting, granted injunctive relief "as prayed for" against all the carriers. None of the carriers have joined in this Petition for Writ of Certiorari. The injunctive relief "*as prayed for*" was granted against those Petitioners insofar as persons using any facilities of the Jackson Municipal Airport Authority or the buses of the bus company Defendants were concerned.* 323 F.2d 201; Appendix "K" submitted herewith.

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*Question of injunctive relief against the City and its officials for enforcing or encouraging racial segregation in the use of terminal facilities of the carriers, except the Jackson City Bus Line and the Municipal Airport Authority, having, the court stated, been eliminated by the decision in *United States v. City of Jackson*, C.A. 5, 318 F.2d 1, brought by the

None of the carriers being Petitioners here, a large portion of the evidence in the record is eliminated. There is here involved none of the alleged acts of any of the carriers, including the Jackson City Lines, in maintaining any racial signs or enforcing or encouraging any racial segregation in their terminals or facilities. Also any testimony as to any incidents occurring outside of the City of Jackson are eliminated, i.e. any incidents not involving officials of the City of Jackson or the Municipal Airport Authority.

That there was no ground for any class action was frankly and freely admitted by Respondents themselves. Each of these three claimants testified that they had never been arrested under any of the statutes or under the ordinance complained of, nor had they been threatened with or in danger of any arrest under such statutes or ordinance. They went further and testified that they themselves had never been deprived of or denied the indiscriminate use of any facility of any Defendant. They also admitted that they had not consulted with any other members of the class they purported to represent before the action was brought and that they knew that all members of the alleged class did not approve of their action or did not agree with the position being taken by them in the action. (Broadwater, R. 109-11; Jacob, R. 120-22; Bailey, R. 140-42)

Not only did Respondents, Plaintiffs below, admit that they themselves had never been arrested under any of the "Segregation Statutes", but no other witness testified that he had ever been arrested under any of these statutes or the City Ordinance complained of or been threatened with any arrest thereunder and the undisputed testimony of the City officials was that they had never arrested or threatened

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United States of America under the Interstate Commerce Commission Act. Also eliminated was the question of racial signs maintained by the City of Jackson surrounding terminals, which had been removed as a result of said decision.

arrest of anyone under these statutes (R. 348, 354-6, 359). The unconstitutionality of these statutes was thoroughly recognized by city officials and there was no suggestion of any intent on the part of the City to attempt to enforce such unconstitutional statutes. The Mayor testified that the City had no objection to Negroes using any facility of any carrier where peace and quiet could be maintained and there would be no disturbances (R. 355).

The issue of the existence of the City signs on side walks surrounding terminals being removed and eliminated, the only evidence against the City or its officials dealt with arrests of Freedom Riders under the "Breach of the Peace" statutes. Unquestionably, there were a substantial number of arrests of these Freedom Riders occurring after April, 1961, when the Freedom Riders made their much publicized invasion of Mississippi, all such arrests being made under the Breach of the Peace Statutes. The disorders and breaches of the peace and disturbances caused by these same Freedom Riders in Alabama and the fact that they were coming into Mississippi to create the same disturbances had become public knowledge in the State of Mississippi (R. 492-507, 507-513, 516-519). One objection was made to the evidence of these arrests in this cause on the ground that it was a collateral attack on criminal actions pending in the State court (R. 474, et seq). These cases are still pending in the State Courts and several of them have now been submitted to the Supreme Court of the State of Mississippi and a decision may be reached therein at any time.[2]

In each instance of such arrest for breaches of the peace sufficient crowds had congregated under such circumstances as to indicate to local officials probable breaches of the

[2] If such a decision is handed down prior to a decision in this Petition, copies of the opinions will be submitted as a supplement hereto.

peace. The police officers in their opinion were convinced in each instance that there would have been trouble and there would have been a breach of the peace had the police not taken action. Such action prevented any serious disturbances in Mississippi. In each instance the police, before any arrest, ordered the crowds or groups dispersed. In each instance only those who refused to obey the order of the police to disperse or move on were arrested. In each instance in arrests of the Freedom Riders both white and colored were arrested at the same time, i.e. all were arrested who refused to move on at the order of the officers at a time when and under circumstances such that a breach of the peace could be occasioned by the failure of the crowd to obey the orders of the police (R. 370-6, 378-9, 381-2, 386-8, 444-49, 454-56, 459-46, 185-6, 261-71).

However, we again point out that none of the Respondents were among the groups so arrested under the "Breach of the Peace" statutes or even in the crowd at the time or observed any such arrest.

As to the Municipal Airport Authority, a separate statutory authority created by Sections 7545-32, et seq. of the Code pertinent portions of which are submitted as Appendix "B" hereto. The proof showed that there had been racially discriminatory signs in the airport terminal. However, prior to the final decree of the Court below and on June 4th, 1962, these signs had all been removed from the airport (R. 770). None of the Segregation Statutes were applicable to the airport. The Airport Authority had no jurisdiction over the enforcement of law or arrests in the airport, a City policeman being assigned to the airport and the policeman not taking orders from the Authority. There was no evidence of any arrests in the airport and none had been reported to the Authority. The Authority had no policy of discrimination. True, the airport restau-

rant, operated by Cicero Carr, had been segregated by this lessee of the Airport Authority over whom the Airport Authority had no control. However, when Carr refused to conform to the Decree of the District Court to discontinue such discrimination and before the final order in the District Court, the Authority terminated Carr's lease and filed an affidavit to the effect that in the future the Authority itself would operate the restaurant and would operate it without discrimination (R. 810-11).

Again Respondents admittedly had been subjected to no such discrimination themselves and had not been deprived of any use of any airport facility.

The District Court made a finding of Fact and Law that this was not a proper class action and that no relief could be granted other than that to which the Respondents were personally entitled. The Court and adjudged that each of the three plaintiffs had a right to unsegregated use of any transportation facility and were given relief by way of declaratory judgment. The Court held however the Plaintiffs were not entitled to any injunctive relief but jurisdiction was retained for the entry of further orders and relief as might be subsequently appropriate (R. 740, Appendices F, G, H, I and J).

Reasons for Allowance of Writ

1. *The ruling of the United States Court of Appeals for the Fifth Circuit that this was a proper class action and that Respondents were entitled to class relief is in direct conflict with decisions of this Court and in direct conflict with prior decisions of the Circuit Court of Appeals of the Fifth Circuit and in direct conflict with prior decisions of other Courts of Appeal in other Circuits.*

The decision of the Court of Appeals for the Fifth Circuit in this case is in direct conflict with the decision

of this Court in *McCabe v. Atchison*, 59 L.ed. 169, 235 U.S. 151. There an action was brought by a few Negroes for a class injunction against railroad carriers to prevent them from complying in any way with a State separate coach law. There the Complainants had never requested the Defendants for accommodations in any sleeping cars, dining cars or chair cars and Complainants had never been notified by the Defendants that they would not be furnished to them, when furnished to others, upon reasonable request and payment of the customary charge. Complainants had thus never been refused accommodations equal to those afforded to those of the white race. The injunction was sought to be justified on the ground of avoiding a multiplicity of suits, the Complaint alleging "... there being at least 'fifty thousand persons of the Negro race in the State of Oklahoma' who will be injured and deprived of their civil rights". The lower Court dismissed the Bill and this Court, in affirming the lower Court's decree, stated:

> "... The Complainant cannot succeed because someone else may be hurt. *Nor does it make any difference that other persons who may be injured are persons of the same race* or occupation. It is the fact, clearly established, of injury to the Complainant—not to others, which justifies judicial intervention. ... The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks. The bill is wholly destitute of any sufficient ground for injunction, and unless we are to ignore settled principles governing equitable relief, the decree must be affirmed."

The decision of the Court below is in direct conflict with *Dawley v. City of Norfolk*, 159 F.Supp. 642, affirmed 260 F.2d 647, C.A. 4, Certiorari denied, 3 L.ed.2d 636, 359 U.S. 935. There an action was brought by a Negro attorney for a mandatory injunction requiring the City to remove the word "colored" from doors of certain restrooms in a courthouse building occupied by State Courts and Judges. The Court held that this relief could not be secured by plaintiff. The District Court Judge pointed out: "There had been no threats or orders to plaintiff with respect to using the rest rooms in the state courthouse building."

The decision of the Circuit Court of Appeals for the Fifth Circuit is in direct conflict with decisions of other Federal Courts of other Circuits holding that a party cannot obtain injunctive relief on behalf of a class where he is not a member of the class in that he has not been personally discriminated against or deprived of rights sought to be obtained for others or actually suffered any wrongs sought to be remedied in the litigation on behalf of the class. These Decisions include: *Kansas City v. Williams*, C.A. 8, 205 F.2d 47; *Hickey v. Illinois Central Railroad*, C.A. 7, 278, F.2d 529; *Rock Drilling, Blasting, etc. v. Mason & Hanger Co.*, C.A. 2, 214 F.2d 687; *Carroll v. Associated Musicians of Greater New York*, C.A. 2, 316 F.2d 574; *Brown v. Ramsey*, C.A. 8, 185 F.2d 225. See also: *Johnson v. Crawfis*, 128 F.Supp. 230; *Anderson v. Kelly*, 32 F.R.D. 355; *Conley v. Gibson*, 29 F.R.D. 519.

The decision of the Court of Appeals for the Fifth Circuit in this case is, we submit, in direct conflict with prior decision of this Court in this case, i.e *Bailey v. Patterson*, 368 U.S. 347, 7 L.ed.2d 332, and *Bailey v. Patterson*, 369 U.S. 31, 7 L.ed.2d 512. In the first opinion on a Motion for an injunction *pendente lite* to stay the prosecution of a number of criminal cases in Mississippi Courts, the Court

denied relief on the primary ground that there was no justification for the extraordinary remedy and two concurring justices, Mr. Justice Black and Mr. Justice Frankfurter, also pointed out that: "The three movants are not themselves being prosecuted or threatened with prosecution in Mississippi . . ."

In the second decision, in overruling the Order of the Three-Judge Court that the case be delayed pending a State construction of the statutes involved, 369 U.S. 31, 7 L.ed.2d 512, this Court held that the Respondents lacked standing to enjoin prosecutions under the Mississippi Breach of the Peace Statutes in that "They cannot represent a class of whom they are not a part".

After the remand of this case after these decisions no additional evidence was offered with reference to any discrimination against the Respondents or any matters or things making them a member of the class for whom they sought relief. This case stands before this Court on this issue on exactly the same facts that existed at the time of the prior decisions.

The Court of Appeals for the Fifth Circuit apparently misconstrues one sentence in the decision of this Court in 369 U.S. 31, 7 L.ed.2d 512. This Court merely stated: "But as passengers using the segregated transportation facilities they are aggrieved parties and have standing to enforce *their rights* to nonsegregated treatment. *Mitchell* v. *United States*, 313 U.S. 80, 93, 85 L.ed. 1201, 1210, 61 S Ct 873; *Evers* v. *Dwyer*, 358 U.S. 202, 3 L.ed.2d 222, 79 S Ct 178." This Court was clearly only referring to Respondents having a standing to enforce their personal rights, not class rights. True, *Mitchell* v. *U.S.*, supra, and *Evers* v. *Dwyer*, supra, were class suits. But in each of those cases the passenger seeking rights was actually a member of the class. For example, in *Mitchell* v. *U.S.*, supra, the

action was brought by a Negro who was himself put off of the pullman into a coach on crossing a state line by an employee of the carrier. The employee in so doing was admittedly engaged in enforcing a State statute. Or, for example, in *Evers* v. *Dwyer*, supra, the Plaintiff himself was ordered to move to the rear of a Memphis bus because of his color and upon his refusal two police officers entered the bus and ordered him to go to the back of the bus or get off and on this order he left the bus.

This Court therefore clearly used these cases as an illustration of the personal rights of Respondents because they were public transportation facility cases and in so using them this Court at the same time clearly stated that Respondents "cannot represent a class of whom they are not a part. *McCabe* v. *Atchison, T & S. F. R. Co.*, 235 U.S. 151, 162, 163, 59 L.ed. 169. . ." This Court did no more than remand the case for disposition by the District Court "of the *appellants'* claims of right to unsegregated transportation service" i.e. referring to their personal rights. It did not hold that they were entitled to class relief.

Note the difference between the order in the prior appeal of this case, supra, and in the order of this Court in the case of *Turner* v. *Memphis*, 7 L.ed.2d 762, 369 U.S. 350. There the plaintiff was "a Negro who was refused nonsegregated service in the Memphis Municipal Airport restaurant" and who brought the action for himself and other Negroes similarly situated. There the plaintiff was a member of the class and the order of this Court read: ". . . The case is remanded to the district court with directions to enter a decree granting appropriate injunctive relief against the discrimination complained." Here there was no order of this Court remanding the case for class relief or for injunctive relief but merely for appropriate personal relief

after the Court had pointed out that Respondents were not entitled to class relief.

The Court of Appeals for the Fifth Circuit frankly admits that the decision in this case is in conflict with prior decisions of that Court, pointing out that it was in conflict with *Clark* v. *Thompson*, 206 F.Supp. 535, affirmed 313 F.2d 637. Petition for Certiorari denied December 16, 1963. The Court of Appeals for the Fifth Circuit adopting the opinion of the District Court which used the following language:

> "None of the plaintiffs has been arrested or threatened with arrest under any statute or alleged discriminatory practice attacked in this case. The plaintiffs have not been denied any right, privilege or immunity claimed by them by any of the defendants. . . . There is no evidence that they have been denied the right to use any public recreational facility in that city . . . This is not a proper class action, and no relief may be granted other than that to which the plaintiffs are personally entitled . . . The plaintiffs cannot make this a legitimate class action by merely calling it such . . . Class action cannot be maintained where the interests of the plaintiffs . . . are not wholly compatible with the interests of those whom they purport to represent."[*]

The decision here is also in conflict with another decision of the Court of Appeals of the Fifth Circuit, i.e. *Brown* v. *Board of Trustees*, 187, F.2d 20, where the Court cited with approval *McCabe* v. *Atchison*, supra, and pointed out ". . . it is elementary that he has no standing to sue for the deprivation of the civil rights of others." The Court there also pointed out: "A suit to supervise and control by in-

[*] Even in a class suit claimant's interest must be wholly compatible with that of the class. *Troup* v. *McCart*, C.A. 5, 284 F.2d 289.

junction the general conduct of a political subdivision of the state, this suit has for its purpose, not the mere according of a specific right which has been denied, but the establishment of a sort of general government by injunction over the school district in respect of its schools and school system . . . Such an injunction . . . will not usually be granted."

We submit that the Court of Appeals of the Fifth Circuit in the opinion here is in error in saying the decisions of that Court are divided on this question in that there is no Fifth Circuit decision authorizing a class suit under the circumstances here.

In support of that position the Court of Appeals of the Fifth Circuit refers to *Derrington* v. *Plummer*, 240 F.2d 922, certiorari denied sub nom *Casey* v. *Plummer*, 353 U.S. 924, 1 L.ed.2d 719. The facts in that case are stated in the District Court opinion in 148 F.Supp. 326 sub nom *Plummer* v. *Casey* where the Court pointed out: "Plaintiffs contend that they are and have been routinely excluded from the court house cafeteria solely by reason of their race and color specifically, plaintiffs allege that they were excluded on August 27th, 1953, when they sought to buy and consume food upon the premises." The case was clearly a proper class action.

The Court of Appeals of the Fifth Circuit then refers to *Shuttlesworth* v. *Gaylord*, 202 F.Supp. 59, affirmed sub nom *Hanes* v. *Shuttlesworth*, 310 F.2d 303, based on a prior decision of that Court in *City of Montgomery, Alabama* v. *Gilmore*, 277 F.2d 364. In both of those cases the defendant city was unquestionably enforcing under state statutes and city ordinances complete segregation of municipal facilities. The specific question of the right to maintain a class action was not raised. However, in each of those cases the plaintiffs themselves had filed a petition with the city authorities seeking as Negroes personal permission to use the facilities and had been refused such right. Here

the respondents freely admitted that they had never been denied any right to do anything they wanted to do (R. 110, 11, 122, 142).

The Court below has sought to justify its decision on the basis of desegregation of schools cases citing *Potts* v. *Flax*, C.A. 5, 313 F.2d 284, in turn citing *Bush* v. *Orleans Parish School Board*, C.A. 5, 308 F.2d 491, 503. These cases were proper class suits.

The case of *Bush* v. *Orleans Parish School Board*, C.A. 5, 308 F.2d 491, affirming 204 F. Supp. 568, is merely a final step in a long series of decisions.[5] The litigation was brought by a group of minor Negro plaintiffs and all Negroes similarly situated seeking desegregation of the schools of Orleans Parish, Louisiana. The opinion in 138 F. Supp. 33 pointed out that the plaintiffs "have petitioned the Board on three separate occasions asking that their children be assigned to nonsegregated schools." This had been refused these plaintiffs. Desegregation orders were entered. By the time of the decision in 204 F. Supp. 568, which was affirmd 308 F.2d 491, 503, a hundred and one additional intervenors were before the Court. It was a proper class action.

A Negro child can, neither individually nor of course for a class obtain relief in the desegregation of schools until they have personally exhausted their administrative remedy and been denied attendance in a white school, i.e. actually been personally deprived of their rights. *Parham* v. *Dore*, C.A. 8, 271 F.2d 132; *Carson* v. *Warlick*, C.A. 4,

[5] For the prior history of the litigation, see *Bush* v. *Orleans Parish School Board*, E.D.La., 138 F.Supp. 337, affirmed, 5 Cir., 242 F.2d 156; id., 163 F.Supp. 701, affirmed, 5 Cir., 268 F.2d 78; id., 187 F.Supp. 42, affirmed, 365 U.S. 569, 81 S.Ct. 754, 5 L.Ed.2d 806; id., 188 F.Supp. 916, affirmed, 365 U.S. 569, 81 S.Ct. 754, 5 L.Ed.2d 806; id., 190 F.Supp. 861, affirmed, 365 U.S. 569, 81 S.Ct. 754, 5 L.Ed.2d 806; id., 191 F.Supp. 871, affirmed, 365 U.S. 569, 81 S.Ct. 754, 5 L.Ed.2d 806; id., 194 F.Supp. 182, affirmed, *Bonny* v. *Bush*, 365 U.S. [illegible], 81 S.Ct. [illegible], 5 L.Ed.2d 1296; id., 194 F.Supp. 182, affirmed, *Gremillion* v. [illegible], 366 U.S. 568, 81 S.Ct. 1333, 6 L.Ed.2d 1179.

238 F.2d 724, cert. den. 353 U.S. 910, 1 L.Ed. 2d 664; *Covington* v. *Edwards*, C.A. 4, 264 F.2d 780, cert. den. 4 L.Ed.2d 79, 361 U.S. 840; *Holt* v. *Raleigh City Board*, C.A. 4, 265 F.2d 95, cert. den. 4 L.Ed.2d 63, 361 U.S. 818; *McKissick* v. *Durham City Board*, 176 F. Supp. 3. See *Johnson* v. *Stevenson*, C.A. 5, 170 F.2d 108, cert. den. 93 L.Ed. 359, 335 U.S. 801; *Peay* v. *Cox*, C.A. 5, 190 F.2d 123; *Bates* v. *Batte*, C.A. 5, 187 F.2d 142, cert. den. 96 L. Ed. 616, 342 U.S. 815, following *Cook* v. *Davis*, C.A. 5, 178 F.2d 595.

Similarly, in *Potts* v. *Flax*, C.A. 5, 313 F.2d 284, affirming 204 F.Supp. 458, suit was brought by six Negro children of Herbert Teal and one Negro child of Flax. The Court pointed out; "... the children named in the complaint were refused enrollment at the school nearest their respective homes solely on the ground of their race and color."[6] The decree granting class relief was not challenged on the ground that plaintiffs were not members of the class. It was merely challenged on the ground that "such matters are not ... determined on a class basis since the Board 'must' register each child one at a time as individuals."[7] I.e. the contention was made that there could be no class action whatsoever in a school case. The Court merely held: "The *pleaded reason* for challenging the class suit was, therefore, unfounded."

The issue here was not presented in either of the above cases and could not be presented because the plaintiffs were members of the class and actually discriminated against. Any language therein, therefore, with reference to segregation in the schools being discrimination against "a class as a class", which is "appropriate for class relief" is

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[6] Quoting 204 F.Supp. at 460.

[7] Quoting 313 F.2d at 288.

pure dicta insofar as the right of Respondents to bring an action for a class is concerned.

In the present case the Court of Appeals has attempted to *take such language out of context* and thereby in reality *create a new constitutional right*. That Court has said that although Respondents sought class relief (and by the judgment here are in reality granted class relief) it is really not a class action in that plaintiffs "seek the right to use facilities *which have been desegregated* . . ." No other court has gone so far.

No such right is given by the Fourteenth Amendment to the Constitution. This Amendment merely forbids any state from depriving "any person" of due process of law or denying to "any person" the equal protection of the laws. The rights under the Fourteenth Amendment are individual personal rights, not class rights. *Shelley v. Kraemer*, 92 L.ed. 1161, 34 U.S. 1; *McGhee v. Sipes*, 92 L.ed. 1161, 34 U.S. 1; *Sweatt v. Painter*, 339 U.S. 629, 94 L.ed. 1114; *Gaines v. Canada*, 305 U.S. 337, 83 L.ed. 208.

The Constitution only protects against state action depriving an individual of his "life, liberty or property". A man is deprived of none of these merely because he desires in his pursuit of happiness to live in a completely integrated community. Congress cannot under the power given it by the Fourteenth Amendment regulate "all private rights between man and man in society". *Civil Rights Cases*, 109 U.S. 3, 27 L.ed. 836. The effect of such a theory is that any one Negro, although not himself deprived of any of his rights of liberty or to equal protection of the law could require or compel, even contrary to the wishes of other Negroes, complete integration. And yet the Fourteenth Amendment merely prohibits state enforced segregation against an individual and does not command integration. *Shuttlesworth v. Birmingham Board*, 162 F.Supp.

372, affirmed per curiam 3 L.ed.2d 145, 358 U.S. 101; *Holland* v. *Board of Public Instruction*, C.A. 5, 258 F.2d 730; *School Board* v. *Allen*, C.A. 4, 240 F.2d 59; *Cohen* v. *Public Housing Administration*, C.A. 5, 257 F.2d 73; *City of Montgomery* v. *Gilmore*, C.A. 5, 277 F.2d 364, where this same Court said: "We can only call attention to the limit of the pertinent constitutional provision as construed by the Supreme Court, i.e. that it does not compel the mixing of the different races in the public parks."

If the law does not compel integration, how can an individual compel complete integration? The acts of the State must adversely affect the "*legal*" interests of a petitioner, not merely the personal interests. Separate opinion of Judge Frankfurter, *Joint Anti-Fascist Refugee Com.* v. *McGrath*, 95 L.ed. 817, 341 U.S. 123.

The Fourteenth Amendment itself grants no rights but only protects against infringement of existing rights. "Its function is negative, not affirmative, and it carries no mandate for particular measures of reform." *Ownbey* v. *Morgan*, 65 L.ed. 837, 256 U.S. 94. See also *M. & O. R.R. Co.* v. *State*, 153 U.S. 486, 38 L.ed. 793 at pages 506 and 800.

A Negro has under the Fourteenth Amendment no right to general desegregation. For example, he has a constitutional right not to be deprived of the right to serve on a jury, but the Constitution gives him no right to require that there be other Negroes on the jury. By whatever name it was called the Court below was in the final analysis still saying that Respondents had a right to protect the rights of other Negroes although not deprived of their own rights.

The Constitution not requiring segregation and therefore Respondents having no constitutional right to anything but their own personal freedom from discrimination, the fact that they may be aggrieved by or made unhappy by the segregation of others does not allow such person to challenge the constitutionality thereof.

For example, the case of *Tileston* v. *Ullman*, 318 U.S. 44, 87 Led. 603, a state statute prohibited giving of advice as to the use of contraceptives. A physician was aggrieved thereby in that the statute would prevent his giving professional advice to three patients whose condition of health was such that their lives would be endangered by childbirth. The Court held that he had no standing to litigate the constitutional question, the statute obviously depriving his patients and not him of constitutional rights.

Or, for example, in *Tennessee Electric Power* v. *Tennessee Valley*, 306 U.S. 118, 83 Led. 543, an unconstitutional statutory grant of power to the Tennessee Valley Authority to erect a series of dams on the Tennessee River and sell the power created thereby resulted in competition to certain public utility corporations. The Court held that although aggrieved at the result of the unconstitutional Act the utilities could not attack the unconstitutionality thereof.

See also *Collins* v. *Texas*, 223 U.S. 288; 56 Led. 439; *Jeffrey Manufacturing Company* v. *Blagg*, 235 U.S. 571, 59 Led. 364. See concurring opinion of Mr. Justice Frankfurter in *Coltman* v. *Miller*, 307 U.S. 433, 83 Led. 1385; *Erie Railroad* v. *Williams*, 233 U.S. 68, 58 Led. 1155; *Tumey* v. *Wiscl*, 334 U.S. 385, 92 Led. 1460, 93 L.Ed. 389.

The only time that any person has been allowed to attack the constitutionality of a statute, except for the direct and explicit purpose of redressing a wrong actually done him, is in a class case. Class cases are a creature of equity and have always been in our jurisprudence subject to the provision that the plaintiff must be a member of the class. This principle has been readopted in Rule 23 of the Rules of Federal Practice. The allowance of a class suit here under the circumstances of this case would be an instance of the throwing of precedence and established legal principle out of the window. If this decision is allowed to stand, then, at least in the Fifth Circuit, any single Negro can require

the integration of an entire community although he himself has not been in any way discriminated against or denied any rights or privileges under the Constitution and even though as a matter of fact the actual members of the class which he seeks to represent may not desire or approve of the litigation.

2. *The holding of the Court of Appeals of the Fifth Circuit that Respondents for themselves and for the class were entitled to injunctive relief under the facts and circumstances here is in direct conflict with decisions of this Court and of the Courts of Appeal of other circuits and with prior decisions of the Fifth Circuit Court of Appeals.*

The imposing of an injunction against a defendant, and particularly against public officials, is an extraordinary remedy applied with great hesitancy and only under unusual circumstances because of the stigma and the harsh penalties attached thereto. The tendency of some federal courts in civil rights actions to overlook this fact and ignore applicable precedents and long established principles of equity controlling injunctive relief should be curbed by this Court. In some Circuits broad sweeping permanent injunctions are becoming the rule not the exception and we submit, it behooves this Court to require that these established precedents and principles be as applicable in Civil Rights actions as in other actions.

The facts of this case do not justify the granting of any injunctive relief either to the Respondents personally or for a class, much less the granting of the broad sweeping class injunctive relief against public officials. The granting of the injunctive relief by the Circuit Courts of Appeals of the Fifth Circuit here was in conflict with all of the following well established principles.

(a)

A Court will not enjoin the enforcement of state criminal statutes, even if unconstitutional, unless the same have been enforced against petitioner or petitioner is threatened with enforcement thereof, and he is in clear and imminent danger of immediate arrest thereunder.

These Petitioners here were enjoined from enforcing certain unconstitutional criminal statutes of the State of Mississippi, including one Municipal Ordinance. The Municipal Airport Authority had no authority to and did not enforce any statutes. It was undisputed that the officials of the City of Jackson had never enforced any of the statutes complained of nor threatened the enforcement thereof. Respondents position was that they did not need to be actually arrested before obtaining injunctive relief. While under unusual circumstances this is true, there can be no injunctive relief unless Respondents were actually threatened with enforcement of the criminal statutes and were in clear and imminent danger of arrest thereunder. Not only were these Respondents not threatened with any arrest under the statute, but no arrest of anyone had ever been made or threatened or contemplated.

Cases denying the right to injunctive relief under such circumstances include: *Poe v. Ullman*, 6 L.ed.2d 512; 367 U.S. 497; *Bailey v. Patterson*, 7 L.ed.2d 332, 368 U.S. 346; *American Federation of Labor v. Watson*, 90 L.ed. 873, 327 U.S. 582; *Spielman Motor Sales v. Dodge*, 79 L.ed. 1322, 295 U.S. 89; *Stefanelli v. Minard*, 96 L.ed. 138, 342 U.S. 117; *Watson v. Buck*, 85 L.ed. 1416, 313 U.S. 387; *Bradford v. Hunt*, C.A. 5, 84 F.2d 7[illegible]; *Empire Pictures Distributing Company v. City of Fort Worth*, C.A. 5, 273 F.2d 529.

Equity will not grant an injunction because of the mere apprehension or suspicion or fear that there might be a

need therefor. *First National Bank* v. *Albright*, 52 L.ed. 614, 208 U.S. 548; *Walling* v. *Ruettner & Co.*, C.A. 7, 133 F.2d 306; *Redlands Foothill Groves* v. *Jacobs*, 30 F.Supp. 995.

(b)

The refusal of injunctive relief was within the discretion of the trial judge which was not abused.

The trial judge who exercised his discretion in refusing injunctive relief in the District Court was the same trial judge that denied injunctive relief against the same Petitioners, i.e. the City of Jackson and its officials, in the case of *Clark* v. *Thompson*, 206 F.Supp. 539, affirmed by the Court of Appeals, Fifth Circuit 313 F.2d 637.

The Court in denying injunctive relief there specifically held that in his opinion it was unnecessary and that the individual defendants, the City officials, were "all outstanding high-class gentlemen and in my opinion will not violate the terms of the Declaratory Judgment issued herein . . . They will conform to the ruling of this court without being coerced so to do by an injunction." This finding by the trial judge was affirmed by the Fifth Circuit Court of Appeals. It is applicable here.

Cases holding that the discretion exercised by a trial judge in denying injunctive relief is reviewable only for abuse of discretion and that under the facts here there was no abuse of discretion particularly where the injunction sought was to control state officers in the conduct of their office who are presumed to obey the law, include: *Brotherhood* v. *Missouri-Kansas-T. R. Co.*, 4 L.ed.2d 1379, 363 U.S. 528; *Peay* v. *Cox*, C.A. 5, 190 F.2d 123, cert. den. 96 L.ed. 671; *Barnes* v. *City of Gadsden*, C.A. 5, 174 F.Supp. 64, affirmed 268 F.2d 593, cert. den. 4 L.ed.2d 186; *Bowles* v. *Huff*, C.A. 9, 146 F.2d 428; *Hecht Company* v. *Bowles*, 321

U.S. 321, 88 L.ed. 754; *Reliable Transfer v. Blanchard*, C.A. 5, 145 F.2d 551; *Spielman Motor Sales v. Dodge*, 79 L.ed. 1322, 295 U.S. 89; *Beal v. Missouri Pacific R. Corp.*, 312 U.S. 45, 85 L.ed. 577; *Sterling v. Constantin*, 287 U.S. 378, 77 L.ed. 375; *Dawley v. City of Norfolk*, C.A. 4, 159 F.Supp. 642, affirmed 260 F.2d 647, cert. den. 3 L.ed.2d 636; *Kansas City v. Williams*, C.A. 8, 205 F.2d 47.

The trial judge in *Clark v. Thompson*, supra, in exercising his discretion denying injunction against the officials of the City of Jackson also stated that these officials knew what the law was and what their obligations were and that they would conform to the ruling of the Court. He then stated: "I am further of the opinion that during this period of turmoil the time now has arrived when the judiciary should not issue injunctions perfunctorily, but should place trust in men of high character that they will obey the mandate of the court without any injunction hanging over their heads". This statement leads us to:

(c)

An injunction should only issue with great caution and only in exceptional circumstances to prevent immediate irreparable injury.

In *Spielman Motor Sales v. Dodge*, 79 L.ed. 1322, 295 U.S. 89, this Court stated:

> "To justify such interference (by injunction) there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights. . . . The bill contained general allegations of irreparable damage and deprivation of 'rights, liberties, properties and immunities' without due process of law, if the statute were enforced. But the bill failed to state facts suffi-

cient to warrant such conclusions, which alone were not enough."

See also *Dawley v. City of Norfolk*, 159 F.Supp. 642, affirmed 260 F.2d 647, cert. den. 3 L.ed.2d 636; *Beal v. Missouri Pacific*, 312 U.S. 45, 85 L.ed. 577; *Sterling v. Constantin*, 287 U.S. 378, 77 L.ed. 375; *Redlands v. Jacobs*, 30 F.Supp. 995; *American Federation of Labor v. Watson*, 327 U.S. 582, 90 L.ed. 873.

(d)

The Court cannot enjoin the future enforcement of constitutional breach of the peace statutes.

The injunction here ordered by the Court of Appeals was a broad sweeping injunction prohibiting Petitioners from enforcing any policy, practice, custom or custom and usage of segregating persons using transportation facilities under color of the Mississippi Breach of the Peace Statutes.

There had, as reflected by this record, been a substantial number of arrests by City officials under the Breach of the Peace statutes. In each instance both white and colored had been arrested and there had been no arrests when persons gathering in crowds did disperse upon order and no arrests save where the police officers were of the honest and firm conviction that a breach of the peace was imminent.

It is not alleged that these Breach of the Peace statutes are unconstitutional and they are not unconstitutional on their face (See Appendix "Q"). Whether or not they were accutally in any one instance enforced so as to deprive any particular person of his constitutional rights would depend upon the special facts and circumstances of the individual case now pending in the State courts. They were never enforced against Respondents or in their presence. Nor were Respondents ever a member of any of the groups

ordered to move on. Persons so arrested are having their day in court and will have an opportunity to appeal to this court if they so desire. Whether or not there will be any future arrests under this statute that might deprive any particular individual of his constitutional rights will depend upon the facts and circumstances of the arrest, *which cannot be predicted.* And yet the Court of Appeals of the Fifth Circuit has issued a blanket injunction against these Petitioners, public officials who would be presumed to do their duty and obey the law which they understand, preventing them generally from enforcing in any way the Breach of the Peace Statutes where a Negro was involved under penalty of contempt of court proceedings.

In *Douglas* v. *Jeannette*, 319 U.S. 157, 87 L.ed. 1324, certain members of Jehovah's Witnesses had been arrested for soliciting and distributing religious literature under a municipal ordinance prohibiting solicitation without procuring a license from the City authorities. It was alleged that the City officials threatened to continue to enforce the ordinance by arrests and prosecution of any members of the Jehovah Witness under this ordinance and plaintiff members, for all members of the Jehovah's Witnesses, sought an injunction to restrain the city officials from enforcing this ordinance against the members of the Jehovah's Witnesses. The Court, in affirming the dismissal of the petition, used the following language:

> . . . . Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened pro-

ceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent. . . .

"It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. Davis & F. Mfg. Co. v. Los Angeles, 189 US 207, 47 Led. 778, 23 S Ct 498; Fenner v. Boykin, 271 US 240, 70 Led. 927, 46 S. Ct. 492. . . .

". . . It does not appear from the record that petitioners have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith. . . .

"Nor is it enough to justify the exercise of the equity jurisdiction in the circumstances of this case that there are numerous members of a class threatened with prosecution for violation of the ordinance. In general the jurisdiction of equity to avoid multiplicity of civil suits at law is restricted to those cases where there would otherwise be some necessity for the maintenance of numerous suits between the same parties involving the same issues of law or fact. *It does not ordinarily extend to cases where there are numerous parties and the issues between them and the adverse party here the state—are not necessarily identical.* Matthews

v. Rodgers, supra (284 US 529, 530, 76 L ed 454, 455, 52 S Ct 217), and cases cited. *Far less should a federal court of equity attempt to envisage in advance all the diverse issues which could engage the attention of state courts in prosecutions of Jehovah's Witnesses for violations of the present ordinance, or assume to draw to a federal court the determination of those issues in advance, by a decree saying in what circumstances and conditions the application of the city ordinance will be deemed to abridge freedom of speech and religion.*

* * *

"For these reasons, establishing the want of equity in the cause, we affirm the judgment of the circuit court of appeals directing that the bill be dismissed." (emphasis ours)

The language in the last paragraph quoted from the *Douglas v. Jeannette* case, supra, is particularly applicable here. Here the issues between the City and the parties arrested under the Breach of the Peace statutes are not only not necessarily identical but would be different on each occasion of a breach of the peace. A federal court of equity could not attempt to envisage in advance all the diverse issues of fact and law which could engage the attention of the state courts in prosecutions under the Breach of Peace Statutes or assume to draw to a federal court the determination of those issues in advance by a decree, in effect saying that under no circumstances could the Breach of the Peace Statutes be enforced against Negroes in or on transportation facilities.

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* Later cases expressing the reluctance of the federal courts to interfere with the enforcement of criminal statutes by state or municipal authorities and citing and relying on *Douglas v. Jeannette*, supra, include *Kingsley*

We also call the attention of the Court to the language in *United Electrical Workers v. Baldwin*, 67 F.Supp. 235, as follows:

> "It does not appear that any federal right to utilize a solid line of pickets blocking entrance to the plant exists. *Whether such an activity constitutes a breach of the peace under Connecticut law, it is not incumbent upon this court to decide . . . .*
>
> "*. . . And the right of officials of the state to prevent breaches of the peace cannot be denied.* Thornhill v. Alabama, supra, 310 U.S., at 105, 60 S. Ct. 736, 84 L. Ed. 1093. * * * In such situations we are all familiar with the fact that the police often lay down rules which temporarily interfere with one or another basic right. To deny them the power to do so would be as much a burdensome restraint on their duty to preserve the peace. . . ."
>
> (emphasis ours)

See also *Watson v. Buck*, 313 U.S. 387, 85 L.ed. 1460.

(c)

The denial of injunctive relief against the Municipal Airport Authority by the Trial Judge was peculiarly within his discretion.

The only matters and things proved against the Municipal Airport Authority were the presence of some racial signs in the airport and racial discrimination by lessee in the restaurant. Prior to the final decree in the District Court all signs had been removed and the lease of the

Pictures Distributing Co. v. City of Ft. Worth, C.A. 5, 273 F.2d 529; *Stefanelli v. Minard*, 342 U.S. 117, 96 L.Ed. 138; *Wilson v. Schnettler*, 365 U.S. 381, 5 L.ed.2d 620. See also *Bradford v. Hurt*, C.A. 5, 84 F.2d 722.

restaurant to Cicero Carr had been cancelled and an affidavit had been filed by the Municipal Airport Authority to the effect that it would operate the restaurant itself without segregation.

The Court of Appeals of the Fifth Circuit reversed the refusal of the District Judge to enjoin the Municipal Airport Authority in the face of *U.S. v. Grant*, 346 U.S. 629, 97 L.ed. 1303, where this Court in denying injunctive relief after voluntary cessation of alleged illegal conduct by the defendant stated:

> "But the moving party must satisfy the Court that relief is needed. The necessary determination is that there exist some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The Chancellor's decision is based on all the circumstances; his discretion is necessarily broad and his strong showing of abuse must be made to reverse it . . . The government must demonstrate that there was no reasonable basis for the District Judge's decision . . . How much contrition should be expected of a defendant is hard for us to say. This surely is a question better addressed to the discretion of the trial court . . . We conclude that, although the actions were not moot, no abuse of discretion has been demonstrated in the trial court's refusal to award injunctive relief."

3. Even if any relief should have been granted against the City officials, which is denied, no injunctive relief should have been granted against the City of Jackson and the Municipal Airport Authority.

Both the City of Jackson and the Municipal Airport Authority are public bodies, politic. They are not a person under the Civil Rights Act.

Respondents purport to obtain jurisdiction in the federal court under the Civil Rights Act specifically relying on *28 U.S.C. 1343(3)* and *42 U.S.C. 1983*.

The decision of the Court of Appeals of the Fifth Circuit is in direct conflict with: *Monroe* v. *Pape*, 365 U.S. 167, 5 L.ed.2d 492; *Charlton* v. *Hialeah*, C.A. 5, 188 F.2d 421; *Hewitt* v. *Jacksonville*, C.A. 5, 188 F.2d 423.

Conclusion

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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(94924)

Office Supreme Court, U.S.
FILED
DEC 26 1963

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 708

JOE T. PATTERSON, ET AL. *Petitioners*,

v.

SAMUEL BAILEY, ET AL. *Respondents*.

APPENDICES TO PETITION OF CITY OF JACKSON, ALLEN THOMPSON, DOUGLAS L. LUCKEY AND THOMAS B. MARSHALL, COMMISSIONERS OF THE CITY OF JACKSON, AND W. D. RAYFIELD, CHIEF OF POLICE OF THE CITY OF JACKSON, AND JACKSON MUNICIPAL AIRPORT AUTHORITY, A PUBLIC BODY CORPORATE, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX "A"

[705] (R-838) ORDER

(Title Omitted—Filed Nov. 17, 1961)

Pursuant to the opinion of the Court filed herein on November 17, 1961, it is now ordered by the Court that jurisdiction of this action is retained, but that all further [706] proceedings herein be stayed for a reasonable length of time for the parties to repair to the State Court in which such issues may be now pending, or in any court of the state where any of the parties hereto may elect to institute an action for the adjudication of the issues."

ORDERED, this the 17th day November, 1961.

United States Circuit Judge.

s/ SIDNEY C. MIZE,
United States District Judge.

s/ CLAUDE F. CLAYTON,
United States District Judge.

Order Book 1961 at page 542.

APPENDIX "B"

[630] (R-728) OPINION OF THREE-JUDGE COURT

(Filed—Nov. 17, 1961)

MIZE, District Judge:

The plaintiffs in this case are Samuel Bailey, Joseph Broadwater and Burnett L. Jacobs each of whom is an adult Negro citizen of the United States and the State of Mississippi, who filed their complaint herein on June 9, 1961. The defendants in the case as shown by the amended complaint are, Joe T. Patterson, The City of Jackson, Allen C. Thompson, Douglas L. Luckey, W. D. Rayfield, Jackson Municipal Airport Authority, Continental Southern Lines, Inc., Southern Greyhound Lines, Illinois Central Railroad, Inc., Jackson City Lines, Inc., Cicero Carr. Each of the defendants has filed an answer to the amended complaint, setting out their defenses. The issues are clearly defined by these pleadings. The amended complaint was in substance a substitution of the original complaint.

It is the contention of the plaintiffs that Sections [631] 2351, 2351.5, 2351.7, 7784, 7785, 7786, 7786-01, 7787, and 7787.5 of the Code of Mississippi of 1942 are unconstitutional; that the defendants are seeking to enforce these statutes; and that a preliminary injunction should be issued enjoining the defendants and each of them and their successors from enforcing any of these statutes or any other statutes requiring racial segregation on common carriers or in the facilities maintained by common carriers. Plaintiffs further contend that the defendant, City of Jackson and its officials are enforcing an ordinance of the City of Jackson adopted January 12, 1956, and contend that this ordinance of the City is unconstitutional on its face, but that notwithstanding its unconstitutionality, the defendants, City of Jackson and its officials, have threatened to enforce this ordinance against the plaintiffs and members of their class. Plain- (R-729) tiffs further contend that the defendants and each of them, acting under color of the laws of

the state of Mississippi and under color of Sections 2087.5, 2087.7 and 2089.5 of Mississippi Code of 1942, have pursued and will continue to pursue a policy and custom of segregation of negro and white persons on common carriers in the State of Mississippi unless restrained, and they contend further that they have no other speedy or adequate remedy at law other than by injunction. Plaintiffs pray for the organization of a three-judge court as required by Title 28 USC, Section 2284, and pray for the issuance of preliminary and permanent injunctions enjoining [632] each of the defendants from enforcing or attempting to enforce any of the aforementioned statutes or any other statute of the State of Mississippi requiring segregation; pray for an injunction enjoining the City of Jackson or any of its officers from enforcing any of the ordinances of the City of Jackson hereinabove referred to; to enjoin the defendants and each of them from continuing to enforce any policy or custom under color of State law or City ordinances of segregating negro and white passengers on common carriers, or in facilities maintained by any common carrier, from continuing to enforce any policy or custom of segregating the races in the facilities and services of the Jackson Municipal Airport or its restaurant operated by Cicero Carr, and from continuing to arrest, intimidate or threaten to arrest members of their class in connection with the exercise of their Federally protected right to use inter and intra state transportation and services without segregation or discrimination because of their race.

The defendants and each of them in their answers deny that they are enforcing or attempting to enforce any of the statutes against the plaintiffs or any of their class because of their race. Defendants contend that this is the type of action wherein the Federal Court should abstain from (B-730) passing on these statutes until the State courts have first had an opportunity to pass on the laws and city ordinances.

[633] All the defendants contend that no injunction should issue against either of the defendants. More specifically, the defendant Joe T. Patterson contends that this

is not properly a class action; that the amended complaint raises factual and legal controversy involving unsettled questions of state law which should properly be decided first by the Supreme Court of Mississippi in order to avoid unnecessarily deciding constitutional questions, and that there is a full and adequate procedure existing in the State tribunals of the state for the plaintiffs to assert all of their rights and privileges claimed by this suit; and that none of the laws of the State of Mississippi that are complained of in the amended complaint have ever been presented to the highest tribunal or any other court of the State of Mississippi for adjudication. The Attorney General further contends that in effect this suit against the Attorney General in his official capacity is an action against the State of Mississippi, which, under the provisions of the Eleventh Amendment to the Constitution could not be maintained without its consent, and further, that the complaint attacks the enforcement of parts of the criminal laws of the State of Mississippi which have been passed in the sovereign capacity of the State for the purpose of protecting all persons of the state against domestic violence, and undertakes to prevent the enforcement of the ordinances of the City of Jackson and to prevent the State officials of Mississippi from enforcing Sections 2087.5, 2088.5, of the Mississippi Code of 1942. (These statutes are 2087.7 and 1634.5 set out in Appendix D). He contends that these statutes are constitutional and are not being unconstitutionally enforced. He further contends that this action constitutes an attempt to control the law enforcement officials of the City of Jackson, as well as the State of Mississippi in the exercise of their valid discretionary powers and authority.

The defendants, City of Jackson and Allen Thompson, as Mayor, the Commissioners and Chief of Police pleaded that the amended complaint raises primarily factual issues and that the primary issue raised by the amended complaint involves the arrest of the so-called Freedom Riders under Sections 2087.5 et seq of the Code of 1942 and that the arrest of the Freedom Riders was legitimate and in accord with these sections, and that these sections were not

unconstitutionally enforced. They contend specifically that there was no effort to enforce segregation laws by the arrests, but simply to maintain law and order and to prevent breaches of the peace. They further contend that this Court should abstain from passing on the constitutionality of these Acts until passed upon by the Supreme Court of Mississippi and contend, also, that the City of Jackson is an agency of the State of Mississippi and, therefore, not subject to suit.

The defendants, Continental Southern Lines, Inc., Southern Greyhound Lines, Illinois Central Railroad, Inc., Jackson City Lines, Inc., Jackson Municipal Airport Authority and Ojeefa Carr contend that they have not caused the arrest [635] of anyone and, that they are not seeking to enforce the segregation laws of the State of Mississippi, and contend that no injunction should issue against them for the reason that the plaintiffs have a full, complete and adequate remedy at law to redress any grievances they may have.

Briefly, these are the main contentions of the respective parties as reflected by the pleadings in this case.

The majority of the Court has reached the conclusion that under the issues as raised by the pleadings in this case it is the duty of this court to abstain from passing on the issues, but retain the cause of action on its docket and remit the plaintiffs to the State Courts of Mississippi for (R-732) a prior adjudication of the issues and of the scope and meaning of its own statutes as so defined. This Court should simply stay its hand until the adequate and proper remedies provided for by the statutes of the State of Mississippi should be exhausted. By this procedure the comity existing between the Federal Courts and the State Courts would be maintained without any serious injury to anyone. With the exception of Sections 2351 and 7784,[1] the sections of the [636] Mississippi Code complained

[1] The Mississippi Supreme Court in *Lowenstein v. Evans*, 69 Miss. 603, 8 So. 263, held that the Mississippi Anti-Trust Act (Mississippi Code Sections 2351 and 7784, Mississippi Code 1942, hereinafter referred to only as 7784) commences with the [illegible]

of, and the constitutionality of which is under attack herein have never been passed upon by the Supreme Court of Mississippi. These sections 2351, 2351.5, 2351.7, 7784, 7785, 7786, 7786.01, 7787, and 7787.5 of the Mississippi Code of 1942 as amended are set out in Appendix II to this opinion. Before this Court should pass upon the constitutionality of these statutes in this particular case, wherein it is shown by the contentions of the parties that there will be factual issues as well as the constitutionality of the statutes involved, the courts of the State of Mississippi should be afforded an opportunity to pass upon them.

This equitable principle of abstention is well supported by the decisions of the Supreme Court of the United States, as well as by many of the decisions of the various Courts of Appeal and District Courts. It will not be necessary to refer to all the decisions that have adhered to this [637] doctrine, but the quotations from a few of the leading cases will be decisive. Probably the one most nearly in point is the case of Harrison, Attorney General of Virginia, et al v. National Association for the Advancement of Colored People, et al, 360 U.S. 167, in which it was held by the Supreme Court of the United States that the Federal Courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the State Courts have been afforded a reasonable opportunity to pass upon them. (R 734) The court said:

"According every consideration to the opinion of the majority below, we are nevertheless of the view that the District Court should have abstained from deciding the merits of the issues tendered it, so as to afford the Virginia courts a reasonable opportunity to construe the three statutes in question. . . .

"This now well established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts.' Matthews v. Rodgers, 284 U. S. 521, 525, as their 'contribution . . . to furthering the harmonious relationship' between state and federal authority . . . ." Railroad Comm'n v. [1638] Pullman Co., 312 U. S. 496, 501. In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. See e.g. Railroad Comm'n v. Pullman Co., supra; Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168; Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101; American Federation of Labor v. Watson, 327 U.S. 582; Shipman v. DuPre, 339 U.S. 321; Albertson v. Millard, 345 U.S. 242; Government & Civic Employees v. Windsor, 353 U.S. 364. This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication. See Chicago v. Fieldcrest Dairies, Inc., supra, at 172-173.

"The present case, in our view, is one which calls for the application of this principle, since we are unable to agree that the terms of these three statutes leave no reasonable room for a construction by the Virginia

courts which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem."

[639] The Court said, further: "We do not intimate the slightest view as to what effect any such determination might have upon the validity of these statutes. All we hold is that these enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality, so that federal judgment will be based on something that is a complete product of the state, the enactment as phrased by its legislature and as construed by its highest court."

Just as was said by the Supreme Court of the United States, supra, we do not in this case undertake to pass upon any of the issues that have been raised, nor do we intimate whether the statutes are constitutional or unconstitutional, for the reason that the courts of the State of Mississippi should be permitted to pass upon these questions, unin[illegible]fluenced by any adjudication or intimation of ours as to the statutes. We have given careful consideration not only to the opinion of the majority of the Court in that case and the governing rule announced by it, but we also have considered the thinking of Mr. Justice Douglas, who dissented, in which he was joined by the Chief Justice and Mr. Justice Brennan, whose opinion set out the history and doctrine, considering also the decisions cited in the dissenting opinion. However, as a general rule, every lawsuit must be determined by the issues raised in the pleadings in the particular case, and it is our view that, in this particular case, where the con- [640] stitutionality of the statutes of Mississippi is questioned and has never been passed upon by the highest court of the (R. 736) State, a sound discretion requires that the federal courts abstain. In the case of Spector Motor Co. v. McLaughlin, 323 U. S. 101, the Supreme Court used this language:

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . here the distribution of the taxing power as between the

State and the Nation unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law." (Citing authorities).

In connection with Harrison v. N.A.A.C.P., supra, see the many authories cited in the dissenting opinion of Judge Sterling Hutcheson, 159 Fed. Supp. 535, with reference to abstention. In that exhaustive dissent he reviews, at page 540, et seq., the many authorities upholding this doctrine of absention.

We are in thorough accord with the opinion of the Court of the Fifth Circuit in the case of Empire Pictures Distributing Company, Inc., et al v. City of Fort Worth, et al, 273 Fed. (2) 529, in which the Court upheld the doctrine of absention and quotes at length from many of the applicable [641] authorities to that doctrine, and particularly applicable to the issues raised in the case here. In that case the Court said: "At the threshold of the case lies the question whether the trial court ought not sua sponte to have withheld action while the parties resorted to a state tribunal for an authoritative declaration of applicable state law." The Court then, in a very able opinion, and exhaustive, cited the many authorities, quoting from a number of them to the effect that the trial courts should have abstained. We shall not quote at length from that opinion more than to say that we adopt it as announcing the controlling principles of the law (R 737) governing us in abstention in this case. In the earlier case of Railroad Comm'n of Texas, et al v. Pullman Company, et al, 312 U. S. 496, the Supreme Court of the United States said:

"Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies; whether the policy relates to the enforcement of the criminal law, Fenner v. Boykin, 271 U. S. 240; Stephens v. Cherokee Nation, 174 U. S. 445; or the administration of a specialized scheme for

liquidating embarrassed business enterprises, Pennsylvania v. Williams, 294 U. S. 176; or the final authority of a state court to interpret doubtful regulatory laws of the state, Gilchrist v. Interborough Co., 279 U. S. 159; cf. Hawks v. Hamill, 288 U. S. 52,61. These cases reflect a doctrine of abstention appropriate to our federal system whereby the [642] federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary. See Cavanaugh v. Looney, 248 U. S. 453, 457; Di Giovanni v. Camden Ins. Assn., 296 U. S. 64, 73.' This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers."

We think the above authorities and those cited below,[2] along with those mentioned in the various opinions in the cases supra are ample to require that the federal court abstain.

(R 738) Moreover, the doctrine of abstention is peculiarly applicable in this case because of the attack made upon Sections 2087.5, 2087.7 and 2089.5 of the Mississippi Code of 1942 generally known as the peace statutes. All the authorities hereinbefore cited are applicable to these statutes, but there are other authorities which we think are just as applicable and for that reason we are treating those separately. [643] As shown by the pleadings; the plaintiffs are contending that the defendants are using these statutes to enforce segregation and the defendants are contending that these statutes are constitutional and are not being used to enforce segregation, but are being used for the purpose of protecting the public against violence and disturbance of the peace. This Court, in the case of Wykoff, had an occasion to pass upon a petition for habeas corpus growing out of the arrest of one of the

[2] Martin v. Creasy, 360 U. S. 219; County of Allegheny v. Mashuda Co., et al, 360 U. S. 185; Watson v. Buck, 313 U. S. 387; Calloway v. Benton, 336 U. S. 142; Government and Civic Employees Organization of C.I.O. v. Windsor, 353 U. S. 364; Two Guys from Harrison-Allentown v. McGinley, 366 U. S. 582.

"Freedom Riders" in the City of Jackson, wherein it was contended by the petitioner in that case that this statute was being used to enforce segregation. Her petition for the writ of habeas corpus alleged that she was convicted of violation of Section 2087.5 of the Mississippi Code and that she did not have any remedy at law other than the writ of habeas corpus to secure her release, and that her imprisonment was a denial of her due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States. The respondent, the Sheriff of Hinds County, in answering the petition for the writ, averred that she was convicted in a court having jurisdiction and that he was holding the petitioner by virtue of a commitment from that court. The matter was heard before the Court of the Southern District of Mississippi and the writ denied. She immediately petitioned the Court of Appeals for the Fifth Circuit for an appeal in forma pauperis, that the petition be granted and the case advanced. The Court of Appeals [644] denied the petition and since the opinion has not been published, a copy of the opinion rendered by the Court is attached hereto in Appendix III.

(R. 739) In the trial before the lower court it was contended by petitioner that she had no adequate remedy at law, which contention was not upheld, as it was shown that under the statutes of Mississippi particularly she did have a full, adequate and speedy remedy at law and these statutes are set out in the opinion of the District Court, 196 F. Supp. 515. In that case the Court did retain jurisdiction, but since the petitioner did have adequate remedy at law, the writ was denied. In that opinion the Court said: "As heretofore stated, the federal courts are very reluctant indeed to interfere with the orderly process of a state court involving state matters." And cited the cases of Davis v. Burke, 179 U. S. 399; Ex Parte Hawk, 321 U. S. 114; Stack v. Boyle, 342 U. S. 1; Brown v. Allen, 344 U. S. 443.

It is true that upon an application for a writ of habeas corpus there is a federal statute which prohibits the federal courts from interfering with the state courts, ex

cept in those cases specifically authorized by Congress. However, the principle involved is the same, since it is the general doctrine that the federal courts should not lend their equitable powers and injunctive powers until the state courts first have passed upon the constitutionality of its own acts. Section 2283, Title 28, U. S. C. A. prohibits a [645] court of the United States from granting an injunction to stay proceedings in a state court except as expressly authorized by the Act of Congress, or when necessary in aid of its jurisdiction, or to protect and effectuate its judgments. In view of that statute the writ of habeas corpus was denied in the Wykoff case, and citing in support thereof: Empire Pictures Distributing Co. v. City of Fort Worth, 273 Fed.2d 529; Douglas v. City of Jeannette, 319 U. S. 157.

At pages 163-164 of the City of Jeannette case, supra, the Supreme Court of the United States said:

(R-740) "The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the Judiciary Article of the Constitution. Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. • • •

"• • • No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness [646] or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for injunction. • • • Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds ap-

propriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury 'both great and immediate'. * * *

* * * It does not appear from the record that petitioners have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity, by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court."

(R-741) The principles announced in the Jeannette case have been reaffirmed on the basis of that case and the Stefanelli case, 342 U. S. 117, 123-124, in two Supreme Court cases decided this year: Wilson v. Schnettler, et al. 365 U. S. 381, and Tugach v. Dollinger, 365 U. S. 458. These cases are discussed more at length in the Wyckoff case, 196 F. Supp. 522- [647] 523.

The whole question of State-Federal relationships and their history is discussed in a recent decision of the Court of Appeals for the Fifth Circuit in Smith & Son, Inc. v. Williams, 275 F. 2d 396. Beginning on page 402 will be found a large number of cases applicable to the questions before us.

Statutes generally known as peace statutes exist in most of the States of the Union and have been applied under a variety of circumstances in recent times. They have been used by the officers of the States and subdivisions thereof to prevent violence and more serious offenses where people have gathered or are threatening to gather in numbers under pressure of emotional stress. The public press carried an account recently of a congregation of a large number of white people when Negroes sought to make use of bathing beaches at or near Chicago. It was stated that the state officers made use of *loud* speakers

to order the crowd to leave the scene or be subject to imprisonment under state laws. It was not hinted that those who had collected did not have the full right to be where they were. Acting under state peace statutes, the officers simply required them to move on, because in their judgment their presence was likely to lead to a breach of the peace. The scope and reach of such statutes varies from state, and their application to a given situation makes a peculiar call on the judgment of state tribunals before such application should be tested in [648] a court of the United States.

(R-742) The situation disclosed by the facts in this record fall, in our opinion, directly within the scope of the decisions of the Supreme Court requiring abstention until the State courts have decided the full meaning of their respective statutes and their application to the situations which are presented to us.

The record before us shows the pendency of a number of proceedings before the State Courts of Mississippi under the peace statutes, and the class for which the plaintiffs here purport to act is already participating in state court proceedings where all of the questions raised before us may be fully presented with the right of appeal to the Supreme Court of the United States.

An order will be entered therefore, abstaining from further action in this cause to give the State Courts of Mississippi a reasonable opportunity to act either in the cases already pending or in any new case which any of the parties may elect to commence.

(R-743) APPENDIX I

STATUTES INVOLVED

Mississippi Code of 1942

p. 2087.5—"1. Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of [649] the peace may be occasioned thereby:

"(1) crowd or congregates with others in or upon any pier, wharf, dock, jetty, bridge, breakwater, sea wall, bulkhead, or any other structure or structures, or a public street or public highway, or upon a public sidewalk, or any other public place, or in any hotel, motel, store, restaurant, lunch counter, cafeteria, sandwich shop, motion picture theatre, drive-in, beauty parlor, swimming pool area, or any sports or recreational area or place, or any other place of business engaged in selling or serving members of the public, or in or around any free entrance to any such place of business or public building, or to any building owned by a municipality, individual, or a corporation, or a partnership or an association, and who fails or refuses to disperse and move on, or disperse or move on, when ordered so to do by any law enforcement officer of any municipality, or county in which such act or acts are committed, or by any law enforcement officer of the State of Mississippi, or any other authorized person, or

"(2) insults or makes rude or obscene remarks or gestures, or used profane language, or physical acts or indecent proposals to or toward another or others, or disturbs or obstructs or interferes with another or others; or

"(3) while in or on any public bus, taxicab, or [650] other vehicle engaged in transporting members of the public for a fare or charge, causes a disturbance or does or says, respectively, any of the matters or things mentioned in subsection (2) supra, to, toward, or in the presence of any other passenger in said vehicle, or any person outside of said vehicle or in the process of boarding or departing from said vehicle,

or any employee engaged in and about the operation of such vehicle, or

"(4) refusing to leave the premises of another when requested so to do by any owner, lessee, or any employee thereof,

"shall be guilty of disorderly conduct, which is made a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than two hundred dollars ($200.00), or imprisonment in the county jail for not (R-744) more than four (4) months, or by both such fine and imprisonment; and if any person shall be guilty of disorderly conduct as defined herein and such conduct shall lead to a breach of the peace or incite a riot in any of the places herein named, and as a result of said breach of the peace or riot another person or persons shall be maimed, killed or injured, then the person guilty of such disorderly conduct as defined herein shall be guilty of a felony, and upon conviction [651]- (R-744) such person shall be imprisoned in the Penitentiary not longer than ten (10) years.

"2. The provisions of this act are supplementary to the provisions of any other statute of this state.

"3. If any paragraph, sentence, or clause of this act shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision of this act, but such other part shall remain in full force and effect.

Source: Laws of 1960.

p. 1087.7—"1. It shall be unlawful for any person or persons while in or on the premises of another, whether that of an individual person, or a corporation, or a partnership, or an association, and on which property any store, restaurant, sandwich shop, hotel, motel, lunch counter, bowling alley, moving picture theatre or drive-in theatre, barber shop or beauty shop, or any other lawful business is operated which engaged

in selling articles of merchandise or services or accommodation to members of the public, or engages generally in business transactions with members of the public, to:

"(1) prevent or seek to prevent, or interfere with, the owner or operator of such place of business, or his agents or employees, serving or selling food and [652] drink, or either, or rendering service or accommodation, or selling to or showing merchandise to, or otherwise pursuing his lawful occupation or business with, customers or prospective customers, or other members of the public who may then be in such building, or

"(2) prevent or seek to prevent, or interfere with, or seek to interfere with, other persons, expressly or impliedly invited upon said premises, or prospective customers, coming into or frequenting such premises in the normal course of the operation of the business conducted and carried on upon said premises,

"shall be guilty of disorderly conduct, a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars ($500.00), (R-745) or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment.

"2. The provisions of this act are supplementary to the provisions of any other statute of this state.

"3. If any paragraph, sentence, or clause of this act shall be held to be unconstitutional, or invalid, the same shall not affect any other part, portion or provision thereof, but such other part shall remain in full force and effect." Source: Laws of 1950.

[653] p. 2089.5—"1. Any person who disturbs the public peace, or the peace of others, by violent, or loud, or insulting, or profane, or indecent, or offensive, or boisterous conduct or language, or by intimidation, or seeking to intimidate any other person or persons, or by conduct either calculated to provoke a

breach of the peace, or by conduct which may lead to a breach of the peace, or by any other act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars ($500.00), or by imprisonment in the county jail not more than six (6) months, or both.

"2. The provisions of this act are supplementary to the provisions of any other statute of this state.

"3. If any paragraph, sentence or clause of this act shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision thereof, but such other part shall remain in full force and effect." *Source:* Laws of 1960

(R-746) APPENDIX

STATUTES INVOLVED

Mississippi Code of 1942

p. 2351—"If any person or corporation operating a railroad shall fail to provide two or more passenger cars for [654] each passenger train, or to divide the passenger cars by a partition, to secure separate accommodations for the white and colored races, as provided by law, or if any railroad passenger conductor shall fail to assign each passenger to the car or compartment of the car used for the race to which the passenger belongs, he or it shall be guilty of a misdemeanor, and, on conviction shall be fined not less than twenty dollars nor more than five hundred dollars." Source: Code of 1892.

p. 2354.5—"Every railroad company, bus company or other common carrier for hire owning, maintaining or operating a passenger depot, bus station or terminal where a waiting room for passengers is maintained and operated shall cause to be constructed and maintained in connection with such reception or wait-

ing room two closets or retiring or rest rooms to be exclusively used by white passengers in intrastate commerce arriving and departing from such depot, bus station or terminal and the following notice shall be painted or shown in bold letters on the door of one: "Rest room, white female only in intrastate travel", and on the other: "Rest room, white male only in intrastate travel"; and likewise two closets or retiring or rest rooms shall be constructed and maintained for colored passengers in [655] intrastate travel with like signs painted or shown in bold letters on the doors thereof, substituting the word "colored" for "white", and such owner or operator shall see that the closets or rest rooms are equally clean and in equally good sanitary condition.

"No white person shall enter, frequent, occupy or use the colored closets or rest rooms required by this act, and no colored person shall enter, frequent or occupy or use the white closets or rest rooms required by this act, except, however, regularly employed persons of the owner or operator of the passenger depots, bus stations or terminals may enter such closets or rest rooms in the discharge of their assigned duties.

"Any person violating the provisions of this act (R-747) shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars ($1,000.00) or confined in jail for not more than one year, or both." Source: Laws of 1956.

p. 235] 7—"1. Any person traveling in intrastate travel by rail, bus, airline or other common carrier for hire who knowingly or wilfully enters or attempts to enter the waiting room not marked and provided for persons other than his or her race as required by law, shall [656] be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars ($1,000.00) and imprisoned in jail not more than sixty (60) days, or both such fine and imprisonment.

"2. No white person shall enter, frequent, occupy or use the colored waiting room of any depot, bus sta-

tion or terminal when such waiting room is marked in bold letters as required by law; and no colored person shall enter, frequent, occupy or use the white waiting room of any depot, bus station or terminal when same is marked in bold letters as required by law, except, however, regularly employed persons of the owner or operator of depots, bus stations or terminals may enter same in the discharge of their assigned and required duties.

"Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars ($1,000.00) and imprisoned in jail for not more than one year, or both.

"3. No action or suit in law or in equity may be brought in any court of this state against any law enforcement officer for damages for false arrest of any passenger because of a violation of this act, nor shall any common carrier of passengers, or its employees [657] be subject to suit for damages on account of such common carrier of passengers *or* its employees complying with the provisions of this act.

"4. In the event any part or parts of this act shall be held unconstitutional, the remaining portion of this act shall remain in full force and effect." Source: Laws of 1956.

p. 7784—"Every railroad carrying passengers in this state shall provide equal but separate accommodations for the white and colored races by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition to secure separate accommodations; and the conductor of such passenger train shall have power, and is required, to assign (R-748) each passenger to the car, or the compartment of a car, used for the race to which such passenger belongs; and should any passenger refuse to occupy the car *to which* he or she is assigned by the conductor, the conductor shall have power to refuse to carry such passenger on the train, and for such refusal neither he nor the railroad com-

pany shall be liable for damages in any court."
Source: Code of 1892.

p. 7785—"All persons or corporations operating street railways and street, or municipal buses, carrying passengers in this state, and every common carrier by [658] motor vehicle of passengers in this state as defined by section 3(e) of chapter 142 of the laws of 1938 (p. 7634, Code of 1942), shall provide equal, but separate, accommodations for the white and colored races.

"Every common carrier by motor vehicle of passengers in this state, as defined by section 3(e) of chapter 142 of the laws of 1938 (p. 7634, Code of 1942), by buses or street cars operated entirely within the corporate limits of a municipality, or within a radius of 5 miles thereof, shall divide its passengers by the use of an appropriate sign 4"x9 inches, for the purpose of, and in a manner that will "suitably provide for, a separation of the races, and all other buses and motor vehicles carrying passengers for hire in the state of Mississippi shall use a latticed movable partition extending from the top of the seat to the ceiling of the vehicle, said partition not to obstruct the view of the driver of the vehicle to secure such separate accommodation; provided, however, that this act shall not apply to buses operated exclusively for the carrying of military personnel; and the operators of such passenger buses shall have power, and are required, to assign each passenger to the compartment of the bus used for the race to which such passenger belongs; and in no case shall any [659] passenger be permitted to stand in the aisle of the compartment in which he does not belong and is not so assigned; and should any passenger refuse to occupy the compartment to which he or she belongs and is assigned, the operator shall have power to refuse to carry such passenger on the bus; or should either compartment become so loaded in transit as not to permit the taking on of any further passengers for that compartment, then the bus operator shall not be required and shall refuse to take on

any further passengers in violation of this act. Even though such additional passengers may have purchased and may hold tickets for transportation on the said bus, the only remedy said passengers shall have for failure or refusal to carry them under such circumstances is the right to a refund of the cost of his ticket, and for said refusal in either case neither the operator nor the (R-749) common carrier shall be liable for damages in any court. Such partition may be made movable so as to allow adjustment of the space in the bus to suit the requirements of traffic."

Source: Code of 1956.

p. 7786—"The operators of such street cars and street buses and motor vehicles, as defined by chapter 142 of the laws of 1938 (p.p. 7632-7687, Code of 1942) shall have power and are required to assign each passen- [660] ger to the space or compartment used for the race to which such passenger belongs.

"Any passenger undertaking or attempting to go into the space or compartment to which by race he or she does not belong shall be guilty of a misdemeanor, and upon conviction, shall be liable to a fine of twenty-five dollars ($25.00), or, in lieu thereof, by imprisonment for a period of not more than thirty (30) days in the county jail; and any operator of any street car or street bus or motor vehicle as herein defined, assigning or placing a passenger to the space or compartment otherw than the said one set aside for the race to which said passenger belongs shall be guilty of a misdemeanor and, upon conviction, shall be liable to a fine of twenty-five dollars ($25.00), or, in lieu thereof, to imprisonment for a period of not more than thirty (30) days in the county jail."

Source: Code of 1906

p. 7786.01—"Every person or corporation operating street railways and street or municipal buses, carrying passengers in this state, and every common carrier of passengers in this state by motor vehicle, as defined by section 3(c) of chapter 142 of the laws of 1938

(p. 7634, Code of 1942), guilty of wilful and continued failure to observe & comply with the provisions of this act shall be liable to a fine of twenty-five [661] dollars ($25.00) for each offense, and each day's violation of the provision hereof shall constitute a separate violation of this act; provided, however, that in the case of persons or corporations operating street railways and street or municipal buses, the fine shall be ten dollars ($10.00) instead of twenty-five ($25.00). Source: Laws of 1944.

p. 7787—"All officers and directors of street railway companies who shall refuse or neglect to comply with the provisions and requirements of the two preceding sections shall be deemed guilty of a misdemeanor, on conviction shall be fined not less than one hundred dollars or be imprisoned in the county jail not less than sixty, and not more than six months, and any conductor or other employee of such street car company having charge of the same, who shall refuse or neglect to carry out the provisions of this chapter shall, on conviction, be fined not less than twenty-five dollars ($25.00) or be imprisoned in the county jail for not less than ten days nor more than thirty days for each and every offense; provided, that nothing herein contained shall be construed as applying to nurses attending children of the other race." Source: Code of 1906.

p. 7787.5—"1. In all passenger depots, bus stations or terminals owned, operated or leased in the State of [662] Mississippi by a railroad company, bus company or any other common carrier of passengers, the owner or operator thereof shall cause to be constructed and maintained waiting or reception rooms as will secure the comfort of the passengers.

"In such depots, bus stations or terminals there shall be constructed, provided and maintained for the white intrastate passengers a separate waiting or reception room, on each entrance to which shall be painted or shown in bold letters the following: "White waiting room, intrastate passengers"; and in such

depot, bus station or terminal there shall be constructed, provided and maintained a separate waiting or reception room for the color intrastate passengers, on each entrance to which shall be painted or shown in bold letters the following: "Colored waiting room, intrastate passengers."

"2. Any common carrier of passengers for hire or any railroad or bus company, whether an individual or corporation, which fails or refuses to comply with the provisions of this act shall be liable in the penal sum of one thousand dollars ($1,000.00) per day for each day of such failure or refusal, to be recovered by suit filed in the county in which such depot, bus station or terminal is situated, by either the attorney general, the district attorney of the district, or the [663] county attorney of the county in which said passenger depot, bus station or terminal is situated. "In addition to the penalty provided herein, the Attorney General of the State of Mississippi or the district attorney of the district, or county attorney in the county in which said depot, bus station or terminal is situated may file suit in the chancery court of such county for a mandatory injunction to compel compliance with the provisions of this act, and the chancery court of any county wherein the provisions of this act are not complied with shall have jurisdiction to issue an injunction to require compliance with this act, and to hold in contempt of court any railroad company, bus company or any other common carrier of passengers failing to comply with the orders and decrees of the court directing compliance with this act.

"3. The requirements of this act shall not be (R-751) applicable to any person, firm or corporation operating a place of business wherein said person, firm or corporation acts only as ticket agent for a bus company or other common carrier in addition to his regular business and wherein no passenger waiting room or reception room is maintained." Source: Laws of 1956.

[664] (R-752) APPENDIX III

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

In the Matter of:

ELIZABETH PORTER WYCKOFF For a writ of Habeas Corpus

Before TUTTLE, Chief Judge, JONES and WISDOM, Circuit Judges.

By the COURT:

The petitioner herein seeks an order authorizing her to appeal from an order entered July 6, 1961, entered by the United States District Court for the Southern District of Mississippi, and moves for permission to proceed on her appeal upon the original papers filed in said District Court. Petitioner further moves for an immediate hearing of said appeal.

Petitioner asserts that she was arrested "for entering the white waiting room at the Continental Bus Terminal, Jackson, Mississippi, in the company of other interstate passengers of the Negro race, was sentenced on June 5, 1961, to two months imprisonment in the Hinds County Jail, suspended, and a fine of $200 for violating Section 2087.5, Mississippi Code of 1942, As amended."

Petitioner asserts that because of the short term of her detention, and "the clear violation by respondent of the constitution and laws of the United States, the [665] requirements that she must first exhaust her state remedies would, in effect, deny her the right of habeas corpus, in a situation where it was the sole effective remedy with (R-753) which to safeguard her statutory and constitutional rights and liberties."

It no where appears in the petition that the petitioner has attempted to exhaust remedies available to her in the courts of the state of Mississippi, or that there is either an absence of available state remedies or that other circum-

stances exist which render such state remedies ineffective to protect the rights of the prisoner.

The jurisdiction of a federal court is fixed by the Acts of Congress. 28 U.S.C.A. p. 2254 provides as follows:

> p. 2254. State custody; remedies in State courts. An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> An applicant shall not be deemed to have ex- [666] hausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

It not appearing from anything asserted in the petition in this case that petitioner sought to appeal her con- (R-754) viction, which she alleges to have been void and unconstitutional, or that she is financially unable to make bond pending such appeal, and it not appearing that petitioner has no right to test her detention by habeas corpus in the state courts of Mississippi, there appears to be no sound reason for this Court to grant petitioner's motion for expediting the hearing in this Court. There thus appears to be no sound reason for granting petitioner's motion for permission to appeal upon the original papers, since no allegations are contained in the petition asserting petitioner's financial inability to cause the record to be prepared in accordance with the rules of this Court.

The motions are, therefore, DENIED.

APPENDIX "C"

[667] (R-811) Dissenting Opinion of Judge Rives

(Filed—Nov. 17, 1961)

C.A. No. 3133

Samuel Bailey, et al.

Joe T. Patterson, Attorney General of the State of Mississippi, Jackson, Miss., et al.

Rives, Circuit Judge, dissenting:

The complaint seeks to enjoin state-imposed racial segregation in public travel facilities in the State of Mississippi and the City of Jackson, Mississippi. It seeks relief against two types of statutes and ordinances: (1) laws which on their face require the segregation of the races, and (2) laws which purport to deal with the maintenance of law and order but which, according to the complaint, are used to maintain segregation.

The plaintiffs are three adult Negro citizens residing in Jackson, Mississippi, who sue on behalf of themselves and of other Negroes similarly situated and affected by the statutes and ordinances complained of.[1] The defendants are the Attorney General of Mississippi; the City of Jackson, its Mayor, Commissioners and Chief of Police; Jackson Municipal Airport Authority; Continental Southern Lines, Inc.; Southern Greyhound Lines; Illinois Central Railroad, [668] Inc.; Jackson City Lines, Inc.; and Cicero Carr d/b/a Cicero's Airport Restaurant.

The original complaint and motion for preliminary in-

[1] According to the complaint, "the class is composed of Negro citizens and residents of the State of Mississippi and other states who utilize the facilities and services of the defendant carriers located in the City of Jackson, and located in other cities of the State of Mississippi, and who travel in both intrastate and interstate commerce."

junction were filed on June 9, 1961. A hearing on the plaintiffs' motion for preliminary injunction was set for July 10, 1961. That hearing was continued because of the illness of an Assistant Attorney General of Mississippi. The hearing was reset for August 7, 1961.

(R-812) Meanwhile, an Amended Complaint was filed on July 17, 1961. The hearing set for August 7, 1961 was confined to the argument of motions to dismiss, motions to dissolve the three-judge court, motions to abstain; motions for more definite statements, motions to require the plaintiffs to furnish security for costs, and to the plaintiffs' insistence upon a hearing of their motion for preliminary injunction. By order entered on that date, August 7, 1961, the court allowed the Amended Complaint which had been filed July 17, 1961; allowed the plaintiffs to join as an additional party defendant the Jackson Municipal Airport Authority; provided for service upon that party and for the filing of any motions and answers on its behalf; denied the motions to dismiss for lack of indispensable parties; denied, on conditions immediately met, the motions for more definite statements and the motions to require the plaintiffs to furnish security for costs; and carried with the case for later disposition the other motions to dismiss, the motions [663] to dissolve the three-judge court, and the motions to abstain.

Over the plaintiffs' objection, their request to be heard on their motion for preliminary injunction was denied "in view of the broadening of the issues[2] by the Amended Complaint filed on July 17, 1961, and of the bringing in on this date of a new party defendant," and the hearing of the motion for preliminary injunction was passed until September 25, 1961. It was further ordered that on that date the court would hear the case, both on said motion and on the prayer for permanent relief.

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[2] Paragraph 15 of the complaint was amended so as to make specific reference to the disorderly conduct and breach of the peace statutes, Secs. 2087.5, 2087.7 and 2089.5 of the Mississippi Code Annotated (1942), as among those under color of which the defendants pursued a policy, practice, custom and usage of segregating Negro and white passengers.

(R-813) The court stated its intention finally to dispose of the case following the hearing set for September 25, 1961.

On September 25, 1961, over certain objections noted in the transcript of testimony, the court did proceed with the hearing of the case both on the motion for preliminary injunction and on the prayer for permanent relief. The taking of testimony consumed three days—Monday, Tuesday and Wednesday, September 25, 26 and 27. On Thursday, September 28, oral arguments of counsel were heard, and a further exhibit of the plaintiffs (No. 36) was received. The defendant Greyhound Corporation was permitted to take the deposition [673] of A. W. Wilson, which was filed on October 10, 1961. The testimony has now been transcribed and was filed on October 20, 1961, and additional briefs have been filed by the parties and by the amicus curiae, the United States of America.

The evidentiary disputes are not very material. The formal allegations of the complaint, the identity and residence of the plaintiffs, their use of the transportation facilities in question, the identification of the carrier defendants, their use of the busses, cars, terminals, depots, rest rooms, drinking fountains, etc., were all either admitted or established by undisputed evidence. Continental Southern and Greyhound admitted that in their Jackson terminals or depots there are signs on the outside doors of one waiting room which read: "Colored Waiting Room—Interstate Passengers," and signs on the outside doors of another waiting room which read: "White Waiting Room—Interstate Passengers," and on the sidewalks outside the respective waiting rooms are signs which read: "Waiting Room for Colored Only—By Order Police Dept." and "Waiting Room for White Only—By Order Police Dept." Each bus company claimed that it did not place the signs on the sidewalks, and that the signs on or over the doors were placed "pursuant to the provisions of Chapter 258, Laws of 1956, Regular Session of Mississippi Legislature." (R-814) The bus companies further admitted that similar [674] signs on or over the doors appear on waiting rooms in all terminals or depots in the State of Mississippi.

Illinois Central admitted that in its railroad terminal

or depot in Jackson it maintains two separate waiting rooms, on the sidewalk outside of one of which are signs reading respectively: "WAITING ROOM FOR COLORED ONLY, BY ORDER POLICE DEPT." and "WAITING ROOM FOR WHITE ONLY, BY ORDER POLICE DEPT.," and that similar signs are located in the railroad terminal at the bottom of the stairs leading from the trains.

The Chief of Police of Jackson in his testimony admitted that the signs on the sidewalk were placed by the Police Department pursuant to the City segregation ordinance.

Both the two Bus Companies and the Railroad denied enforcing segregation on busses or cars.

The Jackson City Lines admitted that, pursuant to State law, it maintains signs on its busses directing that Negroes and whites sit in separate parts, and that, when those directions are not observed and a "breach of the peace is imminent," it has a policy of stopping the bus and proceeding no further.

The Jackson Municipal Airport Authority admitted segregation of the rest rooms and drinking fountains in its waiting rooms. Cicero Carr, the lessee of the restaurant at the Airport, admitted that he would not serve Negroes in the main dining room, but would serve them on a back counter in a room partially used for storage.

[672] The Mayor of the City of Jackson, the chief law enforcement official of the City, and the State Attorney General were questioned on their racial policy with respect to public transportation facilities. The majority ruled that such testimony was inadmissible, and I dissented. (R-815). The testimony was admitted under Rule 43(c) of the Federal Rules of Civil Procedure as a specific offer of evidence. The statement of the Mayor is so pertinent it should be quoted at length. (The ordinance under discussion in his testimony is the City ordinance requiring the segregation of transportation facilities.)

> "Q. . . . State your understanding of the racial policy of the City of Jackson with respect to transportation facilities in the City of Jackson.

"A. . . . It has been the policy of mine as chief law enforcement officer, and the members of the city council and the police department and of the people of Jackson, to maintain what has worked over the last hundred years to bring happiness and peace and prosperity to everyone within our city. That has been done by a separation of the races, not segregation. We never refer to it as segregation. Now, of course, you know and I know the State law upon which the City ordinance was patterned in 1956, with the preamble put in as ours, showing why—to maintain peace and order [673] and to keep down disturbances. Since I have been Mayor I do not recall one incident where there has been an arrest under this ordinance or any segregation ordinance. We have at all times tried to maintain peace and keep down disturbances. That is the policy. Our policy calls for a great deal of give and take. It is agreeable to both the white and the colored. . . . So you see that laws can come and laws can go and laws can be changed, but the policy adopted here is to maintain happiness and contentment between the races, within the law, and at the same time giving the benefit of the great advantage over the years of living together in peace and quiet. . . .

"Q. Does this ordinance accurately reflect this policy, in effect, which you have just stated? . . .

"A. I think so. . . . However, as Your Honors have read it, you read the last paragraph there, it says, 'The Council of the said City of Jackson owes the duty to its citizens, regardless of race, color, creed or station in life, to maintain good order and to prevent breaches of the peace, and thereby to promote the health and general welfare of all its citizens,' and then of course we adopted the State ordinance in this.

"Q. . . . Does the body of the ordinance, apart [674] from the preamble, reflect the policy of the City of Jackson as you have stated it?"

"A. The policy of the City of Jackson is certainly adopted in the ordinance, which is based on State law, that is taken from State law, and is based on exactly what I have said, the matter of separation of the races."

(R-816) The State Attorney General testified on direct examination that it was his duty to enforce all of the laws in the State. He was extremely evasive on answering whether the State segregation laws affected his duty as Attorney General; however, he did say that they were laws of the State, that they had not been declared unconstitutional and that he would enforce them "if conditions arise to such a point that I thought it was necessary to bring them into effect." He said in a concluding statement:

"My sole purpose since the beginning of these instigated troubles that were instigated outside our State and brought to our State, has been the preservation of peace and order within the borders of the State of Mississippi. I have undertaken that, along with all other public officials and law enforcement officers of this State."

Part of such undertakings were meetings prior to and just after the arrival of the first group of Freedom Riders on May 24, 1961, attended by himself, the Mayor and Chief of [675] Police of Jackson. Plans were discussed at these meetings for dealing with the Freedom Riders. On this point he testified:

"Q. Did you discuss with the Chief of Police what steps he was going to take to preserve law and order?

"A. Yes, we discussed plans.

"Q. What were those plans?

"A. The plan was to do exactly what they did, first of all to keep down riot and disorder, and these arrests necessarily followed. They could have been easily avoided had your clients only wanted them avoided. . . ."

The Attorney General is not responsible for the enforcement of state law in the local courts; he is, nevertheless, the chief policymaker of state law enforcement.

The plaintiffs offered evidence of the arrests for breach of the peace of passengers on the defendant carriers. There is evidence of two incidents on the busses of the Jackson City Lines. (In fact, the records of the City Lines contain reports on only two incidents.) Plaintiff Bailey testified to the arrest of one Charles Patterson, a Negro, for re- (817) fusing to move when a white man got on the bus and sat down next to him. Witness Doris Grayson testified to the arrest of herself and three companions who got on a City Lines bus in the center of the City and sat in a front seat. The bus [676] was stopped for 10 minutes before a policeman came along. In neither instance is there any evidence in the record of an actual or threatened breach of the peace. The driver in the Grayson incident testified:

> "Q. Were there any white persons on the bus?
> "A. Yes.
> "Q. At the time these four Negroes were on the bus?
> "A. Yes.
> "Q. Was there any disturbance on the bus?
> "A. Not a bit.
> "Q. Was there any disturbance outside the bus?
> "A. No, not any."

The record also includes evidence on the arrests of approximately 300 Freedom Riders in the terminals of the defendant interstate carriers. Captain *Ray* of the Jackson Police Department, who personally made the majority, if not all, of the arrests, testified as follows with respect to the activities of the Negroes arrested in the white waiting room of the Illinois Central Railroad:

> "Q. What were the Negroes doing that you arrested in there?
> "A. They came in the terminal.
> "Q. What did they do?
> "A. They came in and some of them had seats and some of them stood.

"Q. What else did they do?

"A. That is about all.

"Q. Were they armed?

[677] "A. I never found any of them armed.

"Q. Were they loud?

"A. No.

"Q. Did they use any curse words?

"A. No.

"Q. Did they strike anybody?

"A. No.

"Q. Did they threaten anybody?

"A. No.

"Q. Did you arrest them?

"A. I sure did.

"Q. For what?

"A. Because their presence provoked people, and caused them to become disturbed, and I felt it best to maintain law and order and to order them to leave there. When they refused to obey my order, they were arrested.

"Q. Would you explain what you mean by 'their presence there provoked people'?

(R-818) "A. Well, as I stated earlier, we had advance notice that they were coming to Jackson to create an incident similar to what has happened in other cities, and my duty there was to maintain law and order, and I felt it best to get the root of the trouble out of there, and that is when I ordered them to leave.

[678] "Q. What did they do in violation of law and order?

"A. When I ordered them to leave, they just stood there, as though they hadn't heard me say a word. I repeated that order several times, and they refused to obey, and that is when I arrested them."

He testified that all the other arrests in the waiting rooms of the remaining depots were virtually identical.

The testimony with respect to the circumstances sur-

rounding the arrests is equally explicit. Chief of Police Rayfield was questioned on the existence of crowds of people around any of the terminals when a group of Riders arrived and were arrested. He testified that there were two such occasions, one on the first arrival at the Trailways terminal on May 24 when he was present, and another when the first group came to the Illinois Central terminal, of which he had a report. At the Trailways terminal, he testified that a number of people were waiting in cars and others congregated outside the terminal. To his knowledge none of them were fighting, loud or armed; their attitude, however, he termed hostile. The ones not in cars were asked to disperse, and they did. At the Illinois Central terminal, Rayfield had reports that 10 or 15 people were milling about in the street exhibiting a hostile and disturbed attitude. They were asked to move, they complied and were gone by the time the Riders arrived. He then testified:

"Q. Did you receive any other reports from your police officers of this nature?

[679] "A. That's the only two.

"Q. The only two reports you know about."

"A. The only two I received where there could have been any situation like you were just discussing. Now, the others I don't recall that there has been any other trouble around any of the terminals."

Captain *Ray* testified that the events within the terminal were roughly similar for all the arrests: Before the arrival of a (R-819) group, people inside the terminal would make remarks, none of which particularly threatened violence. If necessary, he would order all those who did not have tickets or some business in the terminal to leave; they always complied. When the group arrived, some remarks were made, people in the terminal would follow them around, but no acts of violence ever took place. Captain *Ray* ventured the opinion that there might have been incidents of violence had he not arrested the Riders, but there is no indication that the situation could not have

been handled by restraining or arresting the offending party.

This is the extent of the evidence in the record on potential breaches of the peace.

This action was brought by three Negro plaintiffs from the City of Jackson as a class action, on behalf of themselves and other Negroes similarly situated, under the Civil Rights Act, 42 U.S.C. p.1983, which creates an equitable cause of action against

> [680] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . ."

The jurisdiction of the three-judge court is invoked pursuant to 28 U.S.C. p.2281, p.2284 because the constitutionality of state statutes has been attacked. The statutes attacked are the so-called segregation statutes of the State of Mississippi which require racial segregation in all common carriers, and in waiting room and rest room facilities used by the carriers, and provide criminal penalties for carriers and persons refusing to abide by these laws.[3] (R. 820) The defendants attacked the jurisdiction of the three-judge court on the ground that these statutes have never been enforced and no arrests have been made under their provisions. Under the recent case of *Poe v. Ullman*, 1961, 367 U. S. 497, the complete failure to enforce a state law, coupled with its open and notorious violation, prevents the federal courts from reaching the constitutionality of the statute since no case or controversy is presented. [681] If such were the case here, the three-judge court would not have jurisdiction. The evidence shows, however, that the defendant, carriers and the Jackson police maintain signs pursuant to the command of these statutes. This is

[3] These statutes are Title 11, Sections 2351, 2351.5, 2351.7, and Title 28, Sections 7781, 7785, 7786, 7786.01, 7787, 7787.5, Miss. Code Ann. (1942).

sufficient evidence of enforcement to create a case or controversy and maintain the jurisdiction of the three-judge court.

In the alternative, the defendants argue that jurisdiction over the segregation statutes may not extend to the collateral problem of enforcement of segregation by means of the breach of the peace statutes on the grounds: (1) there is no authority under p.2284, and (2) the court may not consider issues of fact. The concept of federal jurisdiction is by no means this narrow. In *Sterling v. Constantin*, 1932, 287 U.S. 378, the jurisdiction of the three-judge court, originally invoked to test a state statute limiting oil production, extended to the Governor of Oklahoma's attempt to institute the same production limitations by fiats under martial law. The three-judge court made extensive findings and concluded: "The evidence shows no insurrection nor riot, in fact, existing at any time in the territory, no closure of the courts, no failure of civil authorities." On this basis, the court held that the invocation of martial law was invalid and that the military orders enforcing the production limitations were a denial of due process. The Supreme Court upheld the district court and (R.821) specifically approved the extensive findings of fact.

> [682] "Accordingly, it has been decided in a great variety of circumstances that when questions of law and fact are so intermingled as to make it necessary, in order to pass upon the federal question, the court may and should, analyze the facts." (287 U.S. at p. 398.)

The Court went on say that the jurisdiction of the three-judge court

> "... extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decisions of such of the questions as in its opinion effectively dispose of the case." (287 U.S. at pp. 393-394.)

See also, *Hart* v. *Oursler*, 1933, 289 U.S. 238; *Florida Lime Growers* v. *Jacobsen*, 1960, 362 U.S. 73; *Evers* v. *Dwyer*, 1958, 358 U.S. 202.

The City of Jackson, its Mayor, Commissioners and Chief of Police argue that the City cannot be sued in this action. They rely upon *Monroe* v. *Pape*, 1961, 365 U.S. 167, 191 n. 50, and *Egan* v. *City of Aurora*, 1961, 365 U.S. 514. The question is also relevant to relief against the Jackson Airport Authority.

The direct holding in *Monroe* v. *Pape* is that a municipal corporation is not a "person" within the meaning of Section 1983 for the purpose of holding it liable for damages, and is based upon the finding that Congress rejected an amendment which would have made such corporations liable for money damages in specific cases. 365 U.S. at 188. [683] The defendants argue that if the City is not a "person" for purposes of damages, it cannot be a "person" for purposes of an injunction and further argue that the Supreme Court specifically so held in footnote 50 of *Monroe* v. *Pape*, supra at p. 191, when it said:

> "In a few cases in which equitable relief has been sought, a municipality has been named, along with city officials, as defendant where violations of 42 U.S.C. p. 1983 were alleged. See, *e.g.*, *Douglas* v. *City of Jeannette*, 319 U.S. 157; *Holmes* v. *City of Atlanta*, 350 U.S. 879. The question dealt with in our opinion was not raised in those cases, either by the parties or by the Court. Since we hold a (R-822) municipal corporation is not a 'person' within the meaning of p. 1983, no inference to the contrary can any longer be drawn from those cases."

The question of whether a municipality could be sued under p. 1983 for *equitable* relief, however, was not before the Court, and I do not believe that the Court intended in a footnote to overrule prior cases, indicating that a municipal corporation could be so sued. See *Douglass* v. *Jeanette*, supra; *Holmes* v. *City of Atlanta*, supra; *Mayor and City Council of Baltimore City* v. *Dawson*, 350 U.S. 877, affirming 220 F. 2d 386 (4 Cir., 1955). This is especially

true when the legislative history upon which the Court relies is directed solely to the question of damages. We are not here [684] concerned with the question of tortious action and the liability of the City taxpayers for such actions over which they had little possible control. The question here is one of prospective equitable relief for the protection of the plaintiffs' constitutional rights against not just the tortious activity of individuals, but the enforcement of City ordinances, officially declaring City policy, and officially recorded on the City Journal. This same issue has been before the Seventh Circuit Court of Appeals since *Monroe* v. *Pape*, and that Court held:

> "'None of the reasons which support a city's immunity from an action for *damages* for tortious injuries already inflicted by its officers, agents or servants applies to this case. No reason is apparent why a city and its official should not be restrained from prospectively violating plaintiffs' constitutional rights pursuant to its own legislative enactment, and an injunction not be granted as provided in p. 1983.'"

Adams v. *City of Park Ridge*, 7 Cir., 1961, 293 F.2d 585, 587. "For these reasons, I believe that footnote 50 in *Monroe* v. *Pape* may be construed to say that, whether or not a municipal corporation is subject to *equitable* relief under p. 1983, no inference from cases indicating that it may is relevant to the issue of its liability for damages." (R. 823) More fundamentally, however, the plaintiffs' right [685] of action against the City does not depend alone upon p. 1983. The rights asserted here are based on the Constitution which itself creates the cause of action for equitable relief and, within the meaning of 28 U.S.C. p. 1343(3) (the jurisdictional provision upon which this suit is based), authorizes this suit. *Cf. Bell* v. *Hood*, 1946, 327 U.S. 678; *Brewer* v. Hoxie School District No. 46, 8 Cir., 1956, 238 F.2d 91, 103; *Hart & Wechsler, The Federal Courts And The Federal System* 794-97 (1953). Doctrines of immunity can have no application to suits in equity brought to restrain invasions of federal constitutional rights. *Sterling* v. *Constantin*, 1932, 287 U.S. 378, 393;

Ex parte Young, 1908, 209 U.S. 155, 156; *Graves* v. *Texas Company*, 1936, 298 U.S. 393, 403-04; *Georgia RR* v. *Redwine*, 1952, 342 U.S. 299, 305 n. 17.

I would hold that the City of Jackson and the Jackson Airport Authority are proper parties.

All motions attacking this court's jurisdiction should be overruled.

Nor should this court abstain from considering the merits. The court may not rely on *Harrison* v. *N.A.A.C.P.*, 1959, 360 U.S. 167, which approves abstention where the state law attacked might be construed by the state courts to avoid the constitutional question, since the segregation statutes are incapable of a valid construction. No authority whatsoever may be found for the proposition that, where a state statute is clearly and unavoidably unconstitutional on its face, comity requires that state courts be allowed the [686] privilege of so declaring. Such a rule would be, not abstention, but abdication of our judicial function. Nor may this court rely on *Douglas* v. *Jeannette*, 1943, 319 U.S. 157, which held that federal courts, as a matter of comity and equitable discretion, should not interfere with state criminal proceedings and law enforcement officials when an adequate remedy is provided in the state proceedings for the (R-824) protection and assertion of all constitutional rights. The primary requirement of *Douglas* v. *Jeannette* is that there be an adequate state remedy; that is not the case here. An exception to *Jeannette* has developed in favor of class actions on behalf of Negroes combatting state supported segregation. As stated by the Court of Appeals in *Morrison* v. *Davis*, 5 Cir., 1958, 252 F.2d 102, 103:

> "This is not such a case as requires the withholding of federal court action for reason of comity, since for the protection of civil rights of the kind asserted Congress has created a separate and distinct federal cause of action. 42 U.S.C.A. p.1983. Whatever may be the rule as to other threatened prosecutions, the Supreme Court *in a case* presenting an identical factual issue affirmed the judgment of the trail court in the Browder case (Browder v. Gayle, D.C., Ala., 142

F.Supp. 707, aff'd 352 U.S. 903) in which the same contention was advanced. To the extent that this is inconsistent with Douglas v. City of Jeannette, Pa., 319 U.S. 157, [687] 63 S.Ct. 877, 87 L.Ed. 1324, we must consider the earlier case modified."

Actually, this is not so much an exception as a practical application of the *Jeannette* requirement of "adequacy." For the alternative to this suit is that a great number of individual Negroes would have to raise and protect their constitutional rights through the myriad procedure of local police courts, county courts and state appellate courts, with little prospect of relief before they reach the United States Supreme Court. That Court already has a heavy docket without numerous such cases. Moreover, the proof of segregation may not be a straightforward proposition. As in the case here, the true nature of state policy and practice may become apparent only after proof of a pattern and practice over an extended period of time. Such a record can only be prepared in a single suit which finally settles the issue once and for all. The some 300 citizens arrested in Jackson since May cannot be expected to provide at their trials a record similar to the one in this case; and yet, without it, there may be no way for them to assert and protect their constitutional rights. All these

(The following letter is an explanation of a correction on Record Page No. 826.)

[688] (R-825) UNITED STATES COURT OF APPEALS FIFTH JUDICIAL CIRCUIT

Richard C. Rives,
Judge.
Montgomery 2, Alabama.

November 30, 1961.

(Filed—Dec. 1, 1961)

Miss Loryce E. Wharton, Clerk,
United States District Court,
Southern District of Mississippi,
Jackson, Mississippi.

Re: Samuel Bailey, et al. v. Patterson, et al.

Civil Action No. 3133

Dear Miss Wharton:

We have been advised that there is a technical error in Judge Rives' dissenting opinion in the above case. At page 15, line 12 of the typed opinion which we submitted, "de novo circuit court trail" should read "de novo county court trail." Will you please make this change wherever necessary.

Sincerely yours,

/s/ PETER R. TAFT.
Law Clerk to Judge Rives.

PRT/ef
cc: Honorable Sidney C. Mize, Honorable Claude F. Clayton.

[689] (R-826) factors go to the "adequacy" of the breach of the peace criminal proceedings and weigh against it. Equally important under the circumstances of this case is that, for some of the reasons above, Negro citizens in Mississippi will not even attempt to exercise their constitutional rights because their state remedies possibly "adequate in theory" are wholly inadequate in practice.

Another factor bearing on the adequacy of the state criminal proceedings is that the Freedom Riders arrested in this case were travelers in interstate commerce. For such travelers to be delayed by arrest and trail, to be required to return for a de novo county court trial, and perhaps again for an appeal, is an unreasonable burden on interstate commerce when their only crime is the assertion of undisputed statutory and constitutional rights. This burden makes the state criminal proceedings wholly inadequate as an alternative to the present suit.

Any farther doubts as to the validity of the distinction drawn in *Morrison v. Davis*, or the refutation of *Douglas v. Jeannette*, are put to rest by considering the bearing of the Fourteenth Amendment and 42 U.S.C.A. p. 1983 on the duty of this court. The Supreme Court had an opportunity to pass on the basic thrust and purpose of the Fourteenth Amendment soon after it was adopted. In the *Slaughter-House Cases*, 1872, 83 U.S. 36, 71-72, the Court said:

> "We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, [690] but which are familiar to us all; and on the most casual examination of the language of these amendments, no one fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formely exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.
>
> (R-827) "We do not say that no one else but the negro can share in this protection. . . . But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or

phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy. . . ."

The last section of the Fourteenth Amendment provides that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Such legislation [691] was already on the books when the *Slaughter-House Cases* were decided, and the very section under which the plaintiffs have brought this suit, 42 U.S.C.A. p. 1983, may be traced to section 1979 of the Revised Statutes and section 1 of the Ku Klux Act of April 20, 1871, 17 Stat. 13. This section was recently before the Supreme Court in *Monroe* v. *Pape*, *supra*, where the Court discussed in detail its legislative history and purposes. As with the Fourteenth Amendment, this section was passed by Congress to secure the newly-won freedom of the Negro population in the South; it was intended to deal more specifically, however, with the securing of these rights in an atmosphere of violence caused by the unleashing of passions and prejudices which the mere assertion of these rights engendered in a portion of the white population. The Congressional solution was to create a remedy through the federal courts. The Court states:

> "The debates are long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." (365 U.S. at 180.)

Mr. Justice Frankfurter adds to this in his separate opinion [692] what might be called the substantive right to the exercise of federal jurisdiction:

> ". . . the theory that the Reconstruction Congress could not have meant p. 1979 principally as a 'juris-

> dictional' provision granting access to an original (R. 828) federal forum in lieu of the slower, more costly, more hazardous route of federal appeal from fact-finding state courts, forgets how important providing a federal trial court was among the several purposes of the Ku Klux Act . . . . Section 1979 does create a 'substantive' right to relief. But this does not negative the fact that a powerful impulse behind the creation of this 'substantive' right was the purpose that it be available in, and be shaped through, original federal tribunals." (365 U.S. at 251-52.)

Not only is it apparent that the purpose of these provisions is to protect the very kind of rights the plaintiffs assert, but the legislative history of section 1983 makes clear that the greater the danger of violence, the more important it is that the federal courts should accept and exercise jurisdiction. Thus, the major portion of the defense of the City of Jackson and of the Attorney General of Mississippi, attempting to justify their actions because of the danger of violence, actually provides the most powerful argument for this court to exercise its jurisdiction and grant a federal remedy to [683] protect the plaintiffs' rights.

The majority takes the position that the major issue in this case is the questionable use of the breach of the peace statutes, and that under the *Harrison* case we should abstain to allow the state courts to construe them. The plaintiffs' attack, however, is upon the segregation statutes, not the breach of the peace statutes, and they allege that the State is practicing the simplest of all evasions—it makes arrests under the breach of the peace statutes for violations of the segregation statutes. If there is substance to this allegation, it would be a fraud upon the jurisdiction of this court to abstain and give recognition to such an evasion. When the constitutionality of a state statute is attacked, we are under a duty to inquire into the law as it is actually applied. In *Poe* v. *Ullman*, *supra*, such an inquiry demonstrated that there was no case or controversy. In an earlier case, *Nashville, C. & St. L. Ry. Co.* v. *Browning*, 1940, 310 U. S. 362, such an inquiry uncovered a valid

administrative amendment to a tax-assessing statute and the alleged discrimination was found to be a valid distinction.[4]

(R-829) [694] In *Sterling* v. *Constantin*, *supra*, the inquiry uncovered the evasion of the Governor of Oklahoma. As a later Supreme Court case interpreted *Sterling* v. *Constantin*,

> "There martial law was employed in support of an order of the Texas Railroad Commission limiting production of oil in the East Texas field. The Governor was sought to be restrained as part of the main objective to enjoin 'the execution of an order made by an administrative . . . commission,' and as such was indubitably within p. 266 (now p. 2284)."[5]

In this case, under the facts shown after a full trial and the law applicable to these facts, I am unable to find a bona fide breach of the peace issue. Rather, the facts clearly show that the arrests are a simple evasion to enforce segregation. This evasion provides no ground for abstention.[6]

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[4] "Here, according to petitioner's own claim, all the organs of the state are conforming to a practice, systematic, unbroken for more than forty years, and now questioned for the first time. It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. 'Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text.'" Nashville, C. & St. L. Ry. Co. v. Browning, 1940, 310 U. S. 362, 369.

[5] Phillips v. United States, 1941, 312 U.S. 246, 253.

[6] See also Evers v. Dwyer, 1958, 358 U.S. 202, where the Court ordered a three-judge court, whose jurisdiction was invoked to enjoin Tennessee transportation statutes requiring segregation, to hear that and "any other method of state-enforced segregation on Memphis transportation facilities."

The Court has continually struck down state-enforced schemes of segregation, whether they were done directly or "ingeniously or ingenuously." Cooper v. Aaron, 1958, 358 U.S. 1, 17; Smith v. Texas, 1940, 311 U.S. 128, 132; Lane v. Wilson, 1939, 307 U.S. 268, 275; *see* Bush v. Orleans

[695] The statutes and ordinances which on their face require the segregation of the races in any transportation facility should be declared unconstitutional, null, and void. *Brown v. Board of Education*, 1954, 347 U.S. 483; *Browder v. Gayle*, M.D. Ala., 142 F.Supp. 707, aff'd 352 U.S. 903 (1954); *Baldwin v. Morgan*, 5 Cir., 1958, 251 F.2d 780; *Boman v. Birmingham Transit Co.*, 5 Cir., 1960, 280 F.2d 531.

It should be declared impermissible to use laws which purport to deal with maintenance of law and order, or any other laws, to maintain segregation of the races in any transportation facility. To that end, it should be declared that no passenger or intended passenger is subject to arrest for disorderly conduct or breach of the peace unless the passenger is himself disorderly or does something more than to occupy some facility or place intended for use by persons of another race and to refuse to remove himself from such place or facility. To arrest a passenger under [696] such circumstances is state-enforced segregation and therefore unconstitutional.

The defendants argue strongly on this last point that the State has merely been asserting its rights under the police power to maintain law and order. The evidence clearly shows, however, that none of the passengers arrested was ever himself disorderly. This poses the question of whether a passenger, whose only crime is the exercise of an undisputed constitutional right, may be arrested because this exercise provokes others to threaten or actually commit disorderly acts. That this is the substance of the defendants' position is clearly inferred from the facts to which they themselves testified—the signs on the sidewalk outside the waiting rooms pursuant to the segregation ordinance, the arrest of all those who attempted to "crack the [R 531] laws" of Mississippi (to use the words of the State Attorney General), and the complete lack of disorderly conduct

Parish School Board, E.D.La., 194 F. Supp. 182, aff'd sub nom. Gremillion v. United States, 30 L.W. 3129 (Sup.Ct. 1961). It is not uncommon for the states to attempt to enforce segregation through general police power statutes. Boynton v. Virginia, (R.S.C. 1960) 364 U.S. 454 (trespass); Boman v. Birmingham Transit Co., 5 Cir., 1960, 280 F.2d 531 (breach of the peace).

on the passenger's part at the time of arrest. This inference is made explicit, however, by the testimony of the Mayor, who states that, by definition, anyone who attempts to test the "separation of the races" creates a breach of the peace and provokes disorder.

This issue must be met head on for the evidence shows that on at least two occasions there was a danger of riots and disorder. Although past disorder does not concern us as far as prospective injunction is concerned, there is [697] a strong possibility that a similar situation would arise after an injunction did go into effect.

The issue is decided by again returning to the basis of this suit, the Fourteenth Amendment and section 1983. The Amendment was adopted and this section passed soon after the completion of the Civil War. A glance at the legislative history of section 1983, cited in *Monroe* v. *Pape*, *supra*, demonstrates that Congress had before it extensive evidence of the violence caused in the South by the newly-won Negro rights. Yet, no where, either in the Amendment or in section 1983, can there be found an intimation that either the danger or the existence of such violence is grounds for the revocation of constitutional rights *granted primarily to Negroes*. Rather, the answer of Congress was to provide federal jurisdiction and a federal remedy for their protection. From this it can only be concluded that the provocation of violence in others is no defense to the denial of these plaintiffs' constitutional rights. If it were, the defendants and this court know that this case would spell the postponement of full enjoyment of constitutional rights by Negroes in the Deep South for many years to come. The Supreme Court faced and decided this issue in *Cooper* v. *Aaron*, 1958, 358 U.S. 1, 16, when it said:

> (R 832) "The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. As this Court said some [698] 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation: 'It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable

> as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.' *Buchanan* v. *Warley*, 245 U.S. 60, 81. Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights."

See also, *Sterling* v. *Constantin*, 1932, 287 U.S. 378; *Sellers* v. *Johnson*, 8 Cir., 1947, 163 F.2d 877; *Roskaill* v. *Morris*, 1961, 211 N.Y.S.2d 25.

A police officer would be justified in requiring a person to move from a transportation facility because of a sudden, unexpected, and extreme danger of bloodshed which could not be otherwise avoided. There is no evidence in this record, however, of such a situation having arisen. In the case of the incidents on the Jackson City Lines buses, there is not even the intimation of potential disorder. Except for the two Freedom Rider arrivals where crowds gathered outside the transportation terminals, there is no evidence of an actual breach of the peace or a potential which a minimum of police officers could not have readily handled by arresting the individual actually creating the disorder. In the [699] case where the crowd surrounded the Illinois Central, it was easily dispersed before the Riders even arrived, putting it in the same situation as all the others. On May 24, the day of the first Rider group, although the crowd was sizable, and their attitude hostile, they never created an actual disturbance or reached proportions beyond the ability of the police to handle, even had the Riders been allowed to remain in the terminal. It should, at this point, be noted that the Mayor of Jackson had been notified by the Attorney General of the United States before the Riders' arrival that, if, in the Mayor's opinion, the situation could not be handled (R 833) by local authorities, he stood ready to send in Federal Marshals to aid the enforcement of order as had been done in Montgomery, Alabama. "And I think it can be said with assurance that, if at any future time the law enforcement officials of Mississippi find that they cannot themselves handle the provocation of violence

caused by the Negroes' exercise of their constitutional rights, the Attorney General of the United States would stand ready to send in Federal Marshals or any stronger force necessary to enforce order. There is no necessity to forego the exercise of rights guaranteed by the Constitution and laws of the United States in order to prevent violence on the part of persons opposed to the exercise of such rights. Any such surrender to mob rule would tremendously encourage mob spirit. We must continue to be ruled not by the mob, but by the Constitution [700] and laws of our Country.

It is my opinion that a permanent injunction should issue against the City of Jackson, its Mayor, Commissioners and Chief of Police, and the Jackson Municipal Airport Authority to restrain them from acting contrary to the foregoing declarations and to protect to the best of their ability the right of any passenger or intended passenger to exercise his constitutional rights on public transportation facilities.

This permanent injunction should extend to the State Attorney General. While he is not responsible for the enforcement of State laws through the local courts, and has prosecuted none of the arrests found in the record, he partook in meetings both before and after the arrival of the Freedom Riders on May 24, which determined the manner in which the situation would be, and thereafter was handled. As the State official primarily charged with the duty to enforce State law, he must be held responsible for the plans made at those meetings and the way in which they have been carried out.

(R. 541) A permanent injunction should issue against Cicero Carr *requiring him to serve without discrimination* at the Airport Restaurant all members of the public who use and frequent the Jackson Municipal Airport and request service.

The carriers, Continental Southern Lines, Inc., Southern Greyhound Lines, Illinois Central Railroad, Inc., [701] and Jackson City Lines, Inc., have stated that they are acting under apparent compulsion of City ordinance or State statute in any maintenance of segregation of the races in their

transportation facilities of which they may be guilty; and, that, promptly upon this court's declaration that such statutes and ordinances are unconstitutional, they will remove all signs indicating that any place or facility is intended for the use of persons of any particular races and will not further enforce or have any part in enforcing segregation of the races in any transportation facility. A simple declaratory judgment is therefore all that seems necessary as to said *carrier* defendants. This court should retain jurisdiction, however, so that further orders and judgments could be entered if it should thereafter be necessary or advisable.

In their prayer for relief, the plaintiffs ask that the enforcement of the segregation statutes and any other statutes used to enforce segregation be enjoined. They include in this prayer not only the restraining of future enforcement, but also the continued enforcement of these statutes against all of those arrested after the filing of this suit. According to the evidence, this includes some 100 persons. The power of the court to grant this request is supported fully by law. In *Ex parte Young*, 1908, 209 U.S. 123, the Supreme Court reaffirmed the principle that a court of equity could enjoin criminal proceedings commenced after the filing of a suit in federal court to enforce the [702] same right. The Court stated:

> (R 835) "It is further objected . . . that a court of equity has no jurisdiction to enjoin criminal proceedings, by indictment or otherwise, under the state law. This, as a general rule, is true. But there are exceptions. When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal court, the latter court having first obtained jurisdiction over the subject matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed . . . . Where one commences a criminal proceeding who is already party to a suit then pending in a court of equity, if the criminal proceedings are brought to enforce the same right that

is in issue before that court, the latter may enjoin such criminal proceedings."

209 U.S. at 161-162. See also, *In re Sawyer*, 1888, 124 U.S. 200, 211; *Truax v. Raich*, 1915, 239 U.S. 33, aff'g 219 Fed. 273 (D. Ariz., 1915). In terms of the anti-injunction statute, 28 U.S.C. p. 2283, it is a power "in aid of our jurisdiction" to prevent state courts from interfering with the determination of issues properly before the federal court. The propriety of granting such a request, however, is dis- [703] cretionary, and only the strongest equities will support such outright interference with state proceedings already commenced. I am of the opinion that such equities exist in this case.

The plaintiffs have had a motion for preliminary injunction pending since the filing of the original complaint on June 9, 1961. Although the plaintiffs filed an amended complaint on July 17 to make more explicit their attack upon the breach of peace arrests, the original complaint is broadly enough framed to include them. When a motion for preliminary injunction has been made, a three-judge court is directed by statute to give an expeditious hearing and decision. 28 U.S.C. p. 2284(4) provides, "the application shall be given precedence and assigned for hearing at the earliest practicable day." 28 U.S.C. p. 1253 provides that the granting or denial of this motion may be appealed directly to the Supreme Court; the appeal lies as a matter of (R 836) right. *R.C.A. v. United States*, N.D. Ill. 1950, 95 F.Supp. 660, aff'd. 341 U.S. 412 (1951). Thus, not only were the plaintiffs entitled to an early hearing and decision, but, in my opinion, they were entitled to a preliminary injunction. As Mr. Justice Brandeis wrote in *Union Tool Co. v. Wilson*, 1922, 259 U.S. 107, 112: "Legal discretion does not extend to refusal to apply well-settled principles of law to a conceded state of facts." The essential facts in this case are undisputed, the law to be applied is clear, irreparable [704] injury is established by evidence of a clear and continued deprivation of constitutional rights. The defendants' argument that such an injunction would have changed the status quo and therefore should not have

been granted was before the Fourth Circuit Court of Appeals in a very similar case involving segregation of transportation facilities, and was decided adversely to the defendants. Henry v. Greenville Airport Commission, 4 Cir., 1960, 284 F.2d 631. The defendants should not be allowed to rely upon their own continued unconstitutional behavior for the purposes of defeating a motion for preliminary injunction. I would follow the ruling in the *Henry* case. See also *Clemons* v. *Board of Education*, 6 Cir., 1956, 228 F.2d 853, 857; *Board of Supervisors* v. *Wilson*, 340 U.S. 909, affirming 92 F.Supp. 986 (E.D.La., 1950) (preliminary injunction granting admission to L.S.U.). Had such an injunction issued, arrests and prosecution of those arrested would have been terminated, starting at the very latest with the date of the first hearing, July 10, 1961.

The continued refusal to rule on this motion, although it has been pending since the 9th of June, is in violation of this court's duty under the law, and the refusal should therefore be construed as a de facto denial. The reason for continuing the first hearing until August 8, 1961, due to the sickness of an Assistant Mississippi Attorney General, may have been warranted with respect to relief against his superior, but the City was present and, [705] (R 837) as subsequent events have shown, it was both willing and able to carry on a vigorous defense in its own behalf.

This, because of the undisputed facts, the clear violation of the plaintiffs' rights, and the unreasonable delay in ruling on the preliminary injunction, all prosecutions of passengers or intended passengers who were arrested for breach of the peace after the filing of the original complaint on June 9, 1961, but who, as the evidence in this case shows, were not themselves disorderly, should be enjoined.

Since this dissenting opinion was written, I have had the opportunity to read the memorandum opinion of Judge Frank M. Johnson, Jr., in *Lewis, et al.* v. *The Greyhound Corporation, et al.*, M.D. Ala., C.A. 1724-N, m.s. filed November 1, 1961, and find myself in agreement with nearly all of the views expressed by Judge Johnson in that opinion.

I respectfully dissent.

APPENDIX "D"

[332] U. S. SUPREME COURT REPORTS

*[368 US 346]

*SAMUEL BAILEY et al.

v.

JOE T. PATTERSON et al.

368 US 346, 7 L ed 2d 332, 82 S Ct 282

Decided December 18, 1961.

SUMMARY

A motion for an injunction to stay the prosecution of criminal cases in a state court was denied by the Supreme Court of the United States in a per curiam opinion, for the reasons appearing in headnote 1, infra.

BLACK and FRANKFURTER, JJ., concurred solely on the ground that the movants were not themselves being prosecuted or threatened with prosecution in the state courts.

HEADNOTES.

Classified to U. S. Supreme Court Digest, Annotated Courts § 698—enjoining state prosecution—standing.

1. A motion for an injunction to stay prosecution in state criminal proceedings will be denied by the Supreme Court of the United States, where, in addition to the considerations normally attending an application for such relief, it appears that a serious question of standing is presented in that the movants themselves are not being prosecuted in the state courts.

Courts § 698—enjoining state prosecution.

2. A federal injunction to stay state criminal proceedings is an extraordinary remedy.

Appearances of Counsel, p. 939, infra.

Per Curiam.

This is a motion for an injunction to stay the prosecution of a number of criminal cases in the [Headnote 1] courts of Mississippi [Headnote 2] pending an appeal to this Court from the judgment of a three-judge Federal District Court. A federal injunction to stay state criminal proceedings is an extraordinary remedy. Cf. Douglas v. Jeannette, 319 US 157, 87 L ed 1324, 63 S Ct 877, 882; Ex parte Young, 209 US 123, 52 L ed 714, 28 S Ct 441, 13 LRA NS 932, 14 Ann Cas 764. In addition to the considerations normally attending an application for such relief, a serious question of *[368 US 347] standing is presented on this *motion, in that it appears that the movants themselves are not being prosecuted in the Mississippi courts. On the record before us the motion for a stay injunction pending appeal is denied.

Mr. Justice Black and Mr. Justice Frankfurter concur in the denial of a stay solely on the ground that the three movants are not themselves being prosecuted or threatened with prosecutions in Mississippi and they therefore reach no other questions.

APPENDIX "E"

[369 US 31]

SAMUEL BAILEY et al., Appellants,

v.

JOE T. PATTERSON et al.

368 US 31, 7 L ed 2d 512, 82 S Ct 549

[No. 643]

February 26, 1962

SUMMARY

The present action was instituted in the United States District Court for the Southern District of Mississippi by Negroes living in Mississippi, seeking injunctions to enforce their constitutional rights to nonsegregated service in interstate and intrastate transportation, alleging that such rights had been denied them under color of state statutes, municipal ordinances, and state custom and usage. A three-judge District Court was convened and abstained from further proceedings pending construction of the challenged laws by the state courts. (199 F Supp 595.)

On appeal, the Supreme Court, in a per curiam opinion, vacated the judgment below, holding unanimously that no state may require racial segregation of interstate or intrastate transportation facilities, and that the constitutional issue presented by the defendants being essentially spurious in view of earlier decisions, no three-judge court was required to hear the action.

HEADNOTES.

Classified to U. S. Supreme Court Digest, Annotated

Parties § 24; Statutes § 37—who may attack—criminal statute—class suits.

1. Persons who do not allege that they have been prosecuted or threatened with prosecution under a state criminal statute lack standing to enjoin criminal prosecutions of others under the statute; they cannot represent a class of which they are not a part.

Civil Rights § 12.5—enforcement of rights.

2. Negro passengers compelled, under state statutes, municipal ordinances, and state custom and usage, to use segregated transportation facilities have standing to enforce their rights to nonsegregated treatment.

[*See annotation reference* 1]

Carriers § 36—racial segregation.

3. No state may require racial segregation of interstate or intrastate transportation facilities.

[*See annotation reference* 1]

Courts § 225.5—three-judge court—frivolous claims.

4. 28 USC § 2281, which requires the convening of a three-judge court in a suit for an injunction against the enforcement of a state statute on the ground of its unconstitutionality, does not require a three-judge court where the claim that a statute is unconstitutional is wholly insubstantial, legally speaking nonexistent, or where prior decisions of the United States Supreme Court make frivolous any claim that a state statute on its face is not unconstitutional.

[*See annotation references* 2, 3]

Courts § 225.5; Statutes § 199—provision for three-judge court—construction.

5. The provision in 28 USC § 2281 for the convening of a three-judge court upon an application for an injunction against the enforcement of a statute upon constitutional grounds is a technical one to be narrowly construed.

[*See annotation references* 2, 3]

Courts § 225.6—three-judge court—racial segregation.

6. A suit brought by Negroes to enjoin the enforcement of state enactments requiring segregated transportation facilities is not one required to be heard by a District Court of three judges under 28 USC §§ 1253, 2281, since the claim that these enactments, on their face, are not unconstitutional is essentially fictitious.

[*See annotation references* 2, 3]

Appeal and Error § 286—from three-judge court—powers of Supreme Court.

7. Although under 28 USC § 1253 a judgment of a three-judge District Court is not directly appealable to the United States Supreme Court where the suit was not one required under 28 USC § 2281 to be heard by a three-judge court, the Supreme Court, on appeal from such a judgment, has jurisdiction to determine the authority of the court below and to make such corrective orders as may be appropriate to the enforcement of the limitations which § 1253 imposes.

Briefs of Counsel, p. 1011, infra.

OPINION OF THE COURT

[369 US 32]

Per Curiam.

Appellants, Negroes living in Jackson, Mississippi, brought this civil rights action, 28 USC § 1343 (3), in the United States District Court for the Southern District of

Mississippi, on behalf of themselves and others similarly situated, seeking temporary and permanent injunctions to enforce their constitutional rights to nonsegregated service in interstate and intrastate transportation, alleging that such rights had been denied them under color of state statutes, municipal ordinances, and state custom and usage.[1] A three-judge District Court was convened, 28 USC § 2281, and, Circuit Judge Rives dissenting, abstained from further proceedings pending construction of the challenged laws by the state courts. 199 F Supp 595. Plaintiffs have appealed; 28 USC § 1253; National Asso. for Advancement of Colored People v Bennett, 360 US 471, 3 L ed 2d 1375, 79 S Ct 1192. We denied a motion to stay the prosecution of a number of criminal cases pending disposition of this appeal. 368 US 346, 7 L ed 2d 332, 82 S Ct 282.

Appellants lack standing to enjoin criminal prosecutions under Mississippi's breach-of- [Headnote 1] peace statutes, since they do not allege that they have been prosecuted or threatened with prosecution under *[369 US 33] them. They cannot *represent a class of whom they are not a part. McCabe v Atchison, T. & S. F. R. Co. 235 US 151, 162, 163, 59 L ed 169, 174, 175, 35 S Ct 69. But as passengers using the [Headnote 2] segregated transportation facilities they are aggrieved parties and have standing to enforce their rights to nonsegregated treatment. Mitchell v United States, 313 US 80, 93, 85 L ed 1201, 1210, 61 S Ct 873; Evers v Dwyer, 358 US 202, 3 L ed 2d 222, 79 S Ct 178.

We have settled beyond question that no State may require racial segregation of interstate [Headnote 3] or intrastate transportation facilities. Morgan v Virginia, 328 US 373, 90 L ed 1317, 66 S Ct 1050, 165 ALR 574; Gayle v Browder, 352 US 903, 1 L ed 2d 114, 77 S Ct 145; Boynton v Virginia, 364 US 454, 5 L ed 2d 206, 81 S Ct 182. The question is no longer open; it is foreclosed as a litigable issue. Section 2281 does not require a three-judge court

[1] The statutes in question are Miss. Code 1942 Tit. 11, §§ 2351, 2351.5, 2351.7, and Tit. 28, §§ 7784, 7785, 7786, 7786.01, 7787, 7787.5.

when [Headnote 4] the claim that a statute is unconstitutional is wholly insubstantial, legally speaking nonexistent. Ex parte Poresky, 290 US 30, 78 L ed 152, 54 S Ct 3; Bell v. Waterfront Comr. of New York Harbor (CA2 NY) 279 F2d 853, 857, 858. We hold that three judges are similarly not required when, as here, prior decisions make frivolous any claim that a state statute on its face is not unconstitutional. Willis v Walker (DC Ky) 136 F Supp 181; Bush v Orleans Parish School Board (DC La) 138 F Supp 336; Kelley v Board of Education (DC Tenn) 139 F Supp 578. We denied leave to file petitions for mandamus in Bush, 351 US 948, 100 L ed 1472, 76 S Ct 854, and from a similar ruling in Booker v Tennessee Board of Education, 351 US 948, 100 L ed 1472, 76 S Ct 856. The reasons for convening an extraordinary court are inapplicable in such cases, for the policy behind the three-judge requirement—that a single judge ought not to be empowered to invalidate a state statute under a federal claim—does not apply. The three-judge requirement is a technical one to be [Headnote 5] narrowly construed. Phillips v United States, 312 US 246, 251, 85 L ed 800, 805, 61 S Ct 480. The statute comes into play only when an injunction is sought "upon the ground of the unconstitutionality" of a statute. There is no such ground when the constitutional issue presented is essentially fictitious.

*[369 US 34]

*This case is therefore not one "required . . . to be heard and determined by a district [Headnote 6] court of three judges," [Headnote 7] 28 USC § 1253, and therefore cannot be brought here on direct appeal. However, we have jurisdiction to determine the authority of the court below and "to make such corrective order as may be appropriate to the enforcement of the limitations which that section imposes." Gully v Interstate Natural Gas Co. 292 US 16, 18, 78 L ed 1088, 1091, 54 S Ct 565; Oklahoma Gas & E. Co. v. Oklahoma Packing Co. 292 US 386, 392, 78 L ed 1318, 1322, 54 S Ct 732; Phillips v United States, 312 US 246, 254, 85 L ed 800, 806, 61 S Ct 480. Accordingly,

we vacate the judgment and remand the case to the District Court for expeditious disposition, in light of this opinion, of the appellants' claims of right to unsegregated transportation service.

Vacated and remanded.

ANNOTATION REFERENCES

1. Race discrimination in transportation, 94 L ed 1121, 1128; 98 L ed 882, 883; 100 L ed 488; 3 L ed 2d 1556; 6 L ed 2d 1302, 1303.

2. Necessity and propriety (under 28 USC § 2281) of three-judge Federal District Court in suits to enjoin enforcement of state statute or administrative order, 4 L ed 2d 1931.

3. Circumstances rendering necessary or proper a three-judge Federal District Court, 83 L ed 1193, 85 L ed 807.

APPENDIX "F".

[732] (R-1470) FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECLARATORY JUDGMENT

(Title Omitted—Filed May 3, 1962)

This action was brought by three Negro citizens and residents of Jackson, Mississippi, to enjoin the alleged enforcement of certain Mississippi statutes which are alleged to be unconstitutional. The statutes sought to be enjoined are Title 11, Sections 2351, 2351.5 and 2351.7, and Title 28, Secs. 7784, 7785, 7786, 7786-01, 7787, 7787.5, Mississippi Code Annotated (1942), hereinafter referred to as Mississippi segregation statutes. Plaintiffs attack the constitutionality of said statutes.

The plaintiffs also seek to enjoin the arrests and prosecutions of persons other than the plaintiffs [733] under Sections 2087.5, 2087.7 and 2089.5 of the Mississippi Code Annotated (1942), as amended in 1960, hereinafter referred to as Mississippi breach of peace statutes.

(R-1471) Plaintiffs do not contend that these statutes are unconstitutional. A three-judge District Court was convened in this case under Title 28 U.S.C. Section 2281. A hearing on plaintiffs' motion for a preliminary injunction was consolidated with a hearing on the merits. The three-judge Court abstained from further proceedings pending construction of the challenged laws by the state courts. 199 F.Supp. 595. Plaintiffs appealed, and the Supreme Court of the United States denied a motion for an injunction pending disposition of the appeal. 368 U.S. 346. The Supreme Court of the United States held that this was not a proper matter for a three-judge District Court, vacated the judgment, and remanded the case to this Court for expeditious disposition of plaintiffs' claims of right to unsegregated transportation service. —— U.S. ——, 7 L.Ed. 2d 512. Accordingly, an order has been entered herein dissolving the three-judge Court.

Findings of Fact

1. None of the plaintiffs has been arrested or threatened with arrest under any of the segregation statutes attacked in this case. The plaintiffs have not been arrested or threatened with arrest under any of the Mississippi breach of peace statutes referred to in the [734] amended complaint. The plaintiffs have not been denied any right, privilege or immunity claimed by them by virtue of said segregation statutes.

2. The interests of the plaintiffs are antagonistic to and not wholly compatible with the interests of (R-1472) those whom they purport to represent. They do not belong to a class which would include the persons arrested and prosecuted in the Mississippi Courts under the breach of peace statutes.

3. There have been no arrests or prosecutions under the segregation statutes attacked in this case for many years, and said statutes have not been enforced in Mississippi.

4. Evidence offered by the plaintiffs affirmatively establishes as a fact that none of the defendants has made any effort to control the action of Negroes in any of the terminals or on any of the carriers involved in this case.

5. The evidence discloses isolated instances of improper behavior on the part of certain law enforcement officers. The fact that they are relatively few in number emphasizes their absence as a general practice or policy. As much as we would like to see it otherwise, law enforcement officers are not infallible. Being human, there are those who are guilty of improper conduct; but the evidence in this case proves that such conduct is a [735] rare exception rather than the general practice. While we cannot condone the mistakes made by a few law enforcement officers, we cannot indict a municipality or a State because of isolated errors in judgment on the part of such officers. For instance, one of plaintiffs' witnesses testified that he used the Jackson airport from fifteen to twenty times a year. On one occasion an unidentified waitress refused to serve him in the restaurant. He did not report this incident to anyone in authority with the (R-1473) airport or with the City.

Plaintiffs' witness, Dr. Jane McAllister, testified that she had commuted daily by bus from Jackson to Vicksburg, Mississippi, for ten years. As a colored person, she had always sat where she wished on the bus. On one occasion she was treated rudely by a Jackson policeman. The same is true of several other isolated instances reflected by plaintiffs' evidence.

6. There was no evidence of any arrest in the City of Jackson of a Negro prior to April, 1961, when the Freedom Riders began their much publicized visits to that City. The arrests of those persons involved both white and colored people who were arrested at the same place and for the same reason. Neither race nor color nor location of facility being used had anything to do with those arrests. No such arrest was made under any of Mississippi's segregation statutes. The cases arising out of those arrests are now pending in the Courts of the [736] State of Mississippi, and this Court should not attempt to determine the merits of those State Court actions.

7. All segregation signs have been removed from the premises of all of the carrier defendants. All facilities in all terminals of the carrier defendants are now being freely used by members of all races, and there is no justification for the issuance of an injunction in this case.

(R-1474) Conclusions of Law

1. This Court has jurisdiction of the parties hereto and the subject matter hereof.

2. This is not a proper class action, and no relief may be granted other than that to which the plaintiffs are personally entitled. In the complaint plaintiffs purported to represent themselves and "other Negroes similarly situated". In the amended complaint plaintiffs purported to represent "Negro citizens and residents of the State of Mississippi and other states". Plaintiffs' right to represent anyone but themselves was put in issue by the pleadings. The testimony of the plaintiffs was conflicting as to the identity of the class purported to be represented. They proved no authority to represent any other person and admitted that other Negroes did not approve of this action.

On appeal, an attempt was made to broaden the alleged class to include white and colored [737] freedom riders. Whether this is a proper class action involves a question of fact. *Flaherty v. McDonald*, D.C. Cal., 178 F.Supp. 544. The plaintiffs cannot make this a legitimate class action by merely calling it such. *Pacific Fire Ins. Co. v. Reiner*, D.C. La., 45 F.Supp. 703. The burden of proof on this issue was on the plaintiffs. *Oppenheimer v. F. J. Young & Co.*, D.C. S.Y., 3 F.R.D. 229. The plaintiffs failed to meet this burden. In addition, a class action cannot be maintained where the interests of the plaintiffs are antagonistic to and not wholly compatible with the interests of those whom they purport to represent. *Flaherty v. McDonald*, D.C. Cal., 178 F.Supp. 544; *Redmond*, (R-1475) *et al v. Commerce Trust Co.*, C.C.A. 8th, 144 F.2d 140; *Brotherhood of Locomotive Firemen and Enginemen v. Graham, et al.*, C.C.A. Dist. of Columbia, 175 F.2d 802; *Kentucky Home Mut. Life Ins. Co. v. Duling*, C.C.A. 6th, 190 F.2d 797; *Advertising Specialty National Association v. Federal Trade Commission*, C.C.A. 1st, 238 F.2d 108; and *Troup v. McCord*, C.C.A. 5th, 238 F.2d 289. The efforts of the plaintiffs to bring white and colored freedom riders within the class represented make it clear that this is not a proper class action. *Baldwin v. Patterson*, ——— U.S. ———, 7 L.Ed.2d 512.

3. The three plaintiffs are entitled to an adjudication of their personal claims of right to unsegregated transportation service by a declaratory judgment [738] herein.

4. It is mandatory upon this Court to declare the Mississippi segregation statutes and City ordinance attacked in this case to be unconstitutional and void as violative of the Fourteenth Amendment to the Constitution of the United States. *Baldwin v. Patterson*, ——— U.S. ———, 7 L.Ed.2d 512.

5. Under the facts of this case, the plaintiffs are not now entitled to injunctive relief. In so holding, this Court is seeking to observe a vital and monumental policy which for many years has been pronounced and followed by the United States Supreme Court and by other Federal Courts to the effect that Federal Courts of equity shall conform to clearly defined Congressional policy by refusing to interfere with or embarrass threatened prosecution in State Courts ex-

cept in those exceptional cases (R-1476) which call for interposition of a Court of equity to prevent irreparable injury which is clear and imminent. The issuance of a writ of injunction by a Federal Court sitting in equity is an extraordinary remedy. *Bailey v. Patterson* (on motion for stay injunction pending appeal), 368 U.S. 346. Injunctive relief will never be granted where the parties seeking same have adequate remedies at law. *Douglas v. City of Jeannette*, 319 U.S. 157, 87 L.Ed. 1324; *Cobb v. City of Malden*, C.C.A. 1st, 202 F.2d 701; *Brown v. Board of Trustees*, U.S. C.A. 5th, 187 F.2d 20; and [739] *State of Mo. ex rel Gaines v. Canada*, 305 U.S. 337, 83 L.Ed. 208. It is discretionary with the Court as to whether it will enjoin enforcement of an unconstitutional statute, and it will not do so in the absence of a strong showing that the plaintiffs will suffer immediate and irreparable injury in the absence of injunctive relief. *Kingsley International Pictures Corp. v. City of Providence*, 166 F.Supp. 456. The Court will not enjoin enforcement of an unconstitutional statute in the absence of evidence that said statute is being enforced. *Poe v. Ullman*, 367 U.S. 497, 81 L.Ed.2d 989. In *Bailey v. Patterson*, ——— U.S. ———, 7 L.Ed.2d 512, the Supreme Court of the United States correctly held that plaintiffs were not entitled to enjoin the criminal prosecutions of the freedom riders, and said:

> "Appellants lack standing to enjoin criminal prosecutions under Mississippi's breach of peace statutes, since they do not allege that they have been prosecuted or threatened with prosecution under them."

(R-1477) 6. The desire to obtain a sweeping injunction cannot be substituted for compliance with the general rule that the plaintiffs must present facts sufficient to show that their individual needs require injunctive relief. *Bailey v. Patterson*, ——— U.S. ———, 7 L.Ed.2d 512; *McCabe v. Atchison T. & S. F. Ry. Co.*, 235 U.S. 151, [740] 59 L.Ed. 169; *Brown v. Board of Trustees*, U.S.C.A. 5th, 187 F.2d 20; and *Kansas City, Mo., et al. v. Williams, et al.* U.S.C.A. 8th, 205 F.2d 47.

7. Although no injunctive relief should now be granted,

this Court should retain jurisdiction over this action and each of the defendants for such further orders and relief as may subsequently be appropriate.

This May 1st, 1962.

/s/ S. C. Mize.

(R 1478) DECLARATORY JUDGMENT

IT IS ORDERED, ADJUDGED AND DECLARED as follows, to-wit:

(1) That this is not a proper class action, and no relief may be granted other than that to which the plaintiffs are personally entitled.

(2) That each of the three plaintiffs has a right to unsegregated transportation service from each of the carrier defendants.

(3) That the Mississippi segregation statutes and City ordinance attacked in this case are unconstitutional and void as violative of the Fourteenth Amendment to the Constitution of the United States of America.

(4) That the plaintiffs are not now entitled to any injunctive relief, but jurisdiction over this [741] action and each of the defendants is hereby retained for the entry of such further orders and relief as may be subsequently appropriate.

(5) That all Court costs incurred herein be and the same are hereby taxed against the defendants.

ORDERED, ADJUDGED AND DECLARED, this 1st day of May, 1962.

S. C. Mize,
United States District Judge

Entered Jackson Division of the Southern District of Mississippi.

Order Book 1962, pages 208 through 210.

APPENDIX "G"

[843] (R-1568) The Court: Well, Gentlemen, upon the findings of facts that I have heretofore made, upon the merits of the case up to that time, I will adhere to that finding of facts that I made at that time. I think from the record those findings of facts were appropriate and proper, except that I will amend the findings of fact to the extent that Cicero Carr (R-1569) under his testimony I think was in violation of the statute and the law where there was discrimination. His testimony showed there was some discrimination. However, I am not [844] going to pass upon the question at this time of whether any injunction shall issue against him or not, but I am going to modify my conclusion of the law in the declaratory judgment to the extent that Cicero Carr's method of serving customers was discriminatory, and that is not lawful, and there shall be and can be no discrimination by him in serving the public who come in for service. So the declaratory judgment will be amended to that extent.

The Court will permit Cicero Carr ten days within which to file any affidavit that he may desire to file as to whether or not he has violated or is violating the ruling of the Court heretofore made and, if so, whether he intends to discontinue same and comply with any declaratory judgment that the Court may render in this cause.

Now, as to the municipal airport, I think those signs appearing over the restrooms and over the drinking fountains are improper and unlawful. I think that there must be no signs at any of the facilities which tend to show and encourage and require, I might say, discrimination or separation of the races. I think those signs should be removed, and I will allow the defendant a week in which to remove those signs, eliminate those signs over the restroom and drinking fountains. If that is not done, then appropriate action will be taken.

(R-1570) In all other respects the findings of fact I have heretofore made will be sustained and upheld and adhered

to, and [845] the motion for amendment will be overruled except to the extent I have already announced with reference to Cicero Carr and the municipal airport.

Now as to the affidavits on the new occurrences, of course, I will not make any announcement until those affidavits and the counter-affidavits have been filed, so that I will have all the affidavits before me when I pass upon that question.

With that, Gentlemen, the court now stands in recess.

APPENDIX "H"

[785] (R-1572) SUPPLEMENTAL FINDINGS OF FACT; CONCLUSIONS OF LAW, AND DECLARATORY JUDGMENT

(Title Omitted—Filed July 25, 1962)

In its declaratory judgment previously entered herein, this Court retained jurisdiction over this action and all of the parties hereto for the entry of such additional orders and for the granting of such additional relief as may be subsequently appropriate.

At the time of the entry of the declaratory judgment herein, counsel for the plaintiffs submitted the form of a judgment which they suggested should be entered [786] which granted plaintiffs an immediate injunction against all defendants. This was treated as a motion for judgment and was denied for the reasons set out in full in this Court's findings of fact, conclusions of law and declaratory judgment in this case.

(R-1573) Prior to the entry of the declaratory judgment herein, affidavits were filed in this action on behalf of Jackson City Lines, Inc., the Greyhound Corporation and Continental Southern Lines, Inc. to the effect that all signs indicating use of any facility by any race had been removed from the premises and buses of said defendants.

Subsequently, an affidavit was filed herein by the plaintiff, Broadwater, to the effect that he had observed "white" and "colored" signs near the water fountains and rest rooms of the Jackson Municipal Airport; that he had observed a sign on a Jackson City Lines Bus indicating that white passengers were to take front seats and colored passengers were to take rear seats; that two waiting rooms were being maintained in the terminal of each carrier defendant, and that the City of Jackson maintained signs on the public sidewalks near the carrier terminals with designations as to white and colored waiting rooms. In response, affidavits were filed on behalf of the Jackson Municipal Airport and the City of Jackson denying any enforcement of the signs complained of and showing use of

all terminal facilities by members of all races without discrimination of any kind. [787] Jackson City Lines, Inc. filed an affidavit to the effect that the failure to remove the sign on its buses was an oversight and that same had been removed.

A hearing was afforded all parties to this proceeding, at which counsel for plaintiffs requested and were granted permission to file additional affidavits. Defendants were given reasonable time within which to file responsive affidavits. The Court ruled tentatively at that time that the signs in the Jackson Municipal Airport should be removed (R-1574) and that the evidence in the case in chief showed discrimination on the part of Cicero Carr, the lessee of the Jackson Municipal Airport Restaurant, in serving members of the colored race and that said discrimination should be discontinued. This finding was supported by an affidavit of Derrick A. Bell filed herein. Subsequently, an affidavit was filed herein by Cicero Carr to the effect that the airport restaurant was being converted to a standup counter service and that there would be no discrimination in serving members of the public in said restaurant because of race, creed or color. An affidavit was filed on behalf of the Jackson Municipal Airport Authority showing removal of all signs from the water fountains and rest rooms in the airport.

An affidavit was filed herein by Royce M. Smith that he was refused service in a restaurant in the terminal of Continental Southern Lines, Inc. in Meridian, Mississippi, by unidentified employees of said restaurant; that he was [788] asked to leave the restaurant by an unidentified police officer of the City of Meridian, Mississippi.

An affidavit was filed herein by Mrs. Clarie Collins Harvey to the effect that she was asked to leave a waiting room of the Continental Southern Lines, Inc. terminal at Gulfport, Mississippi, by unidentified police officers. Responsive affidavits have been filed on behalf of Continental Southern Lines, Inc. to the effect that none of its employees or representatives participated in or were responsible for any of the acts complained of.

Subsequently, an affidavit was filed herein by David

Campbell to the effect that he was permitted to eat in a room operated by Cicero Carr in the Jackson Municipal (R-1575) Airport exclusively for airport personnel. A responsive affidavit was filed by Mrs. Myrtle Nelson, an employee of Cicero Carr in said restaurant. It appears from both affidavits that the occurrence arose out of a mutual misunderstanding as to the status of David Campbell and is not pertinent to any issue of discrimination in this case.

Supplemental Findings of Fact

The signs referring to race near the water fountains and rest rooms of the Jackson Airport were improper but have now been removed.

The sign on the bus of the Jackson City Lines complained of was improper but has now been removed.

(7891) The defendant, Cicero Carr, has discriminated against colored passengers in the restaurant operated by him in the Jackson Municipal Airport, but such discrimination has terminated.

All facilities of all carrier defendants and of the Jackson Municipal Airport Authority are now being used by members of all races without discrimination of any kind.

Supplemental Conclusions of Law

The defendant, Continental Southern Lines, Inc., did not participate in and is not responsible for either the occurrence at Meridian, Mississippi, or the occurrence at Gulfport, Mississippi. Neither of said cities nor the persons involved in said occurrences are parties to this action, and said occurrences are not pertinent to the issues involved herein.

(R-1576) The Court finding that all matters of substance complained of have been corrected and that there will be no recurrence of same, it is of the opinion that the plaintiffs are not now entitled to injunctive relief, but that this Court should retain jurisdiction over this action and over the defendants for such further orders and relief as may subsequently be appropriate.

That all future complaints made herein by the plaintiffs, or any of them, shall be by one or more supplemental complaints reciting the matters and facts [789] complained of.

This July 23rd, 1962.

S. C. Mize,
Judge.

(R-1577) SUPPLEMENTAL DECLARATORY JUDGMENT

IT IS ORDERED, ADJUDGED AND DECLARED as follows, to wit:

(a) That each of the three plaintiffs has a right to unsegregated service from the defendant, Cicero W. Carr, in the restaurant at the Jackson Airport.

(b) That the plaintiffs are not now entitled to any injunctive relief, but jurisdiction over this action and each of the defendants is hereby retained for the entry of such further orders and relief as may be subsequently appropriate.

(c) That all future complaints made herein by the plaintiffs, or any of them, shall be by one or more supplemental complaints reciting the matters and facts complained of.

(d) That all Court costs incurred herein be and the same are hereby taxed against the defendants.

ORDERED, ADJUDGED AND DECLARED this 23rd. day of July, 1962.

[791] S. C. Mize,
United States District Judge.

O. B. 1962, pp. 365, 366, 367, 368, 369, 370

APPENDIX "I"

[850] (R-1598) Re: Bailey, et al v. Jackson, Patterson, et al

No. 3133

Gentlemen:

I have considered the plaintiffs' motion to amend the Court's supplemental findings of fact and conclusions of law and have reached the conclusion from the record and all the affidavits that the motion should be sustained in part and denied in part, and am herewith enclosing you copy of the amended findings of fact and conclusions of law [851] and the amended supplemental declaratory judgment.

Cicero Carr on or about August 1 and 2, 1962 was guilty of discrimination in the operation of the Airport Restaurant, but immediately upon learning thereof the Airport Authority terminated his lease, and he no longer is connected in any capacity whatsoever with the Jackson Municipal Airport Authority. I have further provided in the amended findings of fact that he shall not be reemployed in any capacity or in any connection with the Jackson Municipal Airports.

It is my thought and I have so found that all the other defendants are complying with the declaratory judgment (R 1599) heretofore entered and I am definitely of the opinion that they will continue to do so. I think these defendants are acting in good faith and that they recognize that the law is well settled now so that there will be no further discrimination by any of the defendants.

The matter as to Cicero Carr, as I see it, is really moot since he is no longer connected with any of the defendants and it is not necessary to enter a judgment or any injunction against him. For reasons heretofore stated in my rulings I am of the opinion that an injunction is

not required in this case and I am convinced, as heretofore stated, that all the other defendants will comply with the declaratory judgment heretofore entered in this case. You will note that the order is dated August 22, 1962.

[852] With kindest regard to all of you, I am

Sincerely yours,

S. C. Mize

APPENDIX "J"

[846] (R 1594) ORDER SUSTAINING IN PART AND OVERRULING IN PART PLAINTIFFS' MOTION THAT THE COURT AMEND ITS SUPPLEMENTAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECLARATORY JUDGMENT.

(Title Omitted—Filed Aug. 24, 1962)

In considering plaintiffs' motion to amend this Court's supplemental findings of fact, conclusions of law and declaratory judgment of July 23, 1962, the Court has carefully considered the following:

Plaintiffs' motion to amend.

Affidavit of Austin Hollander dated August 3, 1962.

Affidavit of Peter Richard Gilbert dated August 4, 1962.

Affidavit of Robert Henry Johnson dated August 3, 1962.

Affidavit of Luey Garlock Barker dated August 3, 1962.

Affidavit of Dewey Roosevelt *Green, Jr.* dated August 3, 1962.

[847] (R 1595) Affidavit of T. A. Turner dated August 6, 1962.

These affidavits disclose that on August 1 and 2, 1962, the defendant, Cicero Carr, was guilty of discrimination in the operation of the airport restaurant facilities, but that said defendant's lease agreement with the Jackson Municipal Airport Authority was terminated by the Authority on August 6, 1962, and as soon as the Authority was apprised of the facts set forth in said affidavits. Said affidavits further disclose that the said Cicero Carr will not hereafter have any interest in or control over the operation of the restaurant facilities in the Jackson Municipal Airport and that said facilities are now being and will here-

after be operated without discrimination of any kind. The motion filed by the plaintiffs should be and the same is hereby sustained in part and overruled in part.

AMENDED SUPPLEMENTAL FINDINGS OF FACT

The signs referring to race near the water fountains and rest rooms of the Jackson Airport were improper but have now been removed.

The sign on the bus of the Jackson City Lines complained of was improper but has now been removed.

The defendant, Cicero Carr, has discriminated against colored passengers in the restaurant operated by [848] ling in the Jackson Municipal Airport, but said defendant's lease agreement with the Jackson Municipal Airport Authority has been terminated, and he will no longer have any interest (R 1596) in or control over said restaurant facilities which are now and will hereafter be operated without discrimination of any kind.

All facilities of all carrier defendants and of the Jackson Municipal Airport Authority are now being used by members of all races without discrimination of any kind.

S. C. Mize.

AMENDED SUPPLEMENTAL DECLARATORY JUDGMENT

It Is Ordered, Adjudged and Declared as follows, to-wit:

(a) That each of the three plaintiffs has a right to unsegregated service from the restaurant at the Jackson Airport.

(b) That the defendant, Cicero Carr, should not have any interest in or control over the restaurant facilities in the Jackson Airport in the future and should not be employed in any capacity in the operation of said facilities.

(c) That the plaintiffs are not now entitled [849] (R 1597) to any injunctive relief, but jurisdiction over this action and each of the defendants is hereby re-

tained for the entry of such further orders and relief as may be subsequently appropriate.

(d) That all future complaints made herein by the plaintiffs, or any of them, shall be by one or more supplemental complaints reciting the matters and facts complained of.

(e) That all Court costs incurred herein be and the same are hereby taxed against the defendants.

ORDERED, ADJUDGED AND DECLARED this 22nd day of August, 1962.

S. C. MIZE,
United States District Judge.

O.B. 1962, Pages 434, 435, 436 & 437.

APPENDIX "K"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 20672

SAMUEL BAILEY, ET AL., Appellants,

v.

JOE T. PATTERSON, Attorney General of the State of Mississippi, ET AL., Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

(September 24, 1963.)

Before CAMERON, WISDOM and HAYS,[1] Circuit Judges.

HAYS, Circuit Judge: Plaintiffs, Negroes living in Jackson, Mississippi, appeal from judgments of the United States District Court for the Southern District of Mississippi, S.C., Mize, Judge,[2] which declared unconstitutional both the so-called Segregation Statutes of the State of Mississippi, and a similar ordinance of the City of Jackson, and declared that each of the plaintiffs had a right to unsegregated transportation service from each of the carrier defendants, but denied to appellants injunctive or class relief against any of the defendants.

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[1] Of the Second Circuit, sitting by designation.

[2] Miss. Code Ann. tit. 11, §§ 2351, 2351.5, 2351.7 and tit. 23, §§ 7744, 7745, 7780, 7780.01, 7787, 7787.5 (1942).

[3] The 6 private appellees, Jackson City Lines, Inc., Jackson Municipal Airport Authority, Continental Southern Lines, Inc., Trailways Southern Greyhound Lines, and Illinois Central Railroad Co. are referred to hereafter as the carrier defendants or carrier appellees. The latter two are referred to as the interstate carriers. Jackson City Lines, Inc., Continental Southern Lines, Inc. and Southern Greyhound Lines are referred to as the intrastate carriers or intrastate appellees.

We hold that appellants are entitled to injunctive relief and reverse the judgments, *pro tanto*.

Jurisdiction was invoked under the Civil Rights Act, 28 U.S.C. § 1343, and 42 U.S.C. § 1983. Plaintiffs alleged that defendants, acting under color of state law, policy, and custom, denied to plaintiffs and the class of all others similarly situated, their right to transportation service free from racial discrimination. They based their claim on the Fourteenth Amendment and the Commerce Clause of the Constitution of the United States, and on the Interstate Commerce Act, 49 U.S.C. § 3(1), 316(d). Plaintiffs sought to enjoin the enforcement of state and municipal segregation laws affecting common carriers, and to enjoin all defendants from maintaining racial segregation in any manner, by the use of signs or otherwise, on the carriers' or in or around their terminals or other facilities anywhere in the state. Plaintiffs also sought to enjoin the municipal authorities from continuing to arrest, harass, intimidate, threaten or coerce plaintiffs or members of their class in the exercise of their federally protected rights.

A three judge court, convened pursuant to 28 U.S.C. § 2281, invoked the doctrine of equitable abstention "to give the state courts of Mississippi a reasonable opportunity to act." 199 F. Supp. 595, 601 (S.D. Miss. 1961) (Rives, C.J., dissenting). On a direct appeal, the Supreme Court vacated the judgment, and remanded the case to the district court "for expeditious disposition . . . of appellants' claims of right to unsegregated transportation service . . ." 369 U.S. 31, 34 (1962). The Supreme Court held that the abstention doctrine was inapplicable, and that there was no justification for convening a three judge court.

"We have settled beyond question that no State may require racial segregation of interstate or interstate transportation facilities." *Mayor of Baltimore v. Dawson*,

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[1] While the complaint does not allege that seating on the trains of the Illinois Central Railroad is segregated, this exception does not extend to its depots.

328 U.S. 373; *Gayle* v. *Browder*, 352 U.S. 903; *Boynton* v. *Virginia*, 364 U.S. 454. The question is no longer open; it is foreclosed as a litigable issue. Section 2281 does not require a three-judge court when the claim that a statute is unconstitutional is wholly insubstantial, legally speaking non-existent. * * * We hold that three judges are similarly not required when, as here, prior decisions make frivolous any claim that a state statute on its face is not unconstitutional."

369 U.S. at 33.

The Court also disposed of the argument that plaintiffs lacked standing to bring the action.

"[A]s passengers using the segregated transportation facilities they are aggrieved parties and have standing to enforce their rights to nonsegregated treatment. *Mitchell* v. *United States*, 313 U.S. 80, 93; *Evers* v. *Dwyer*, 358 U.S. 202."

369 U.S. at 33.[4]

Upon the remand, the district court, on the original record before the three judge court, entered judgment declaring the statutes and ordinance unconstitutional, and stating that "each of the three plaintiffs has a right to nonsegregated transportation service from each of the carrier defendants." It ruled, however, that the action was "not a proper class action, and no relief may be granted other than that to which the plaintiffs are personally entitled."[5] The district court found that the segregation statutes were no longer enforced, that the record disclosed only "isolated instances" of improper behavior by law enforcement officials, that segregation signs had been removed from the premises of the carrier defendants, and that all terminal facilities of the carriers were now

[4] Plaintiffs had also sought to set aside certain criminal prosecutions under Mississippi's breach of peace statutes. The Supreme Court held that since plaintiffs did not allege that they had been prosecuted or threatened with prosecution under these statutes, they lacked standing to sue. 369 U.S. at 32.

being fully used by members of all races. It therefore denied injunctive relief, but retained jurisdiction for the entry of further orders as might subsequently appear appropriate.

Appellants promptly moved to amend the findings, and for further relief on the basis of affidavits showing continuing segregation. A hearing was held, and the court found that signs referring to race had remained posted, and that certain other discrimination had continued after the initial order, but that the situation had now been corrected. Injunctive and class relief was again denied.

Upon a subsequent motion again alleging continued segregation, injunctive relief was denied for a third time.

Plaintiffs appeal from all three orders, insofar as they (a) refused to grant injunctive relief, (b) refused to recognize the class nature of the action, and (c) refused to enjoin the City of Jackson from maintaining racial signs on the sidewalks outside the waiting rooms at the terminals of the carrier defendants. These signs had been ignored in the findings and orders of the district court.

Our decision in *United States* v. *City of Jackson*, ___ F. 2d ___, rendered May 13, 1963, after the notice of appeal herein was filed, renders moot the third of the three bases of the appeal. We ordered that an injunction should issue against the City of Jackson, its Commissioners, and its Chief of Police directing the removal of these same signs and any others indicating or suggesting that any of the terminal facilities are for the use of persons of any particular race or color. We further directed that the defendants be enjoined from "otherwise seeking to enforce or encourage racial segregation in the use of terminal facilities of the carriers."

[1] The moving papers alleged that Negroes were still being discriminated against in the restaurant at the Jackson Municipal Airport. The court found that the manager of the restaurant, the defendant Cicero Carr, had continued to discriminate against Negroes in the restaurant, but that the lease had terminated and he would no longer have any interest in or control over the restaurant facilities. It ordered that Carr should not be employed by those facilities in the future, but denied further relief.

Only the first two bases for the appeal hereof remain for our consideration.

We find it unnecessary to set forth the evidence in detail. Suffice it to say that appellants, all Negro residents of Jackson, Mississippi, have experienced racial segregation in using the facilities of each of the carrier appellees. Separate waiting rooms, drinking fountains, rest rooms and other terminal facilities were maintained by the carrier appellees, and signs directed to race were posted in the terminals of the interstate carrier defendants, and on the buses of the Jackson City Lines. The latter signs directed Negroes to the rear of the bus. Negro witnesses, other than appellants, testified to instances in which they had been ordered by drivers of each of the bus companies appellees to sit in the rear of the bus, and in which police had been called and the witnesses arrested upon their refusal to comply. Appellants introduced in evidence approximately 190 judgments of conviction for breach of the peace entered against persons arrested in waiting rooms of the interstate carrier appellees in Jackson at the time of the so-called Freedom Ride demonstrations in the summer of 1961. Appellants themselves have neither been arrested nor threatened with arrest for refusal to comply with the segregation laws or policies of the appellees. They were, however, users of appellees' segregated facilities and thus acquired standing to sue. *Bailey v. Patterson*, *supra*, 369 U.S. at 33. The law is crystal clear that they were not required to subject themselves to arrest in order to maintain this suit. *Effers v. Ducote*, 358 U.S. 202 (1958); *Morrison v. Pace*, 252 F. 2d 102 (5th Cir.), cert. denied, 356 U.S. 968 (1958); *Baldwin v. Morgan*, 251 F. 2d 780, 787 (5th Cir. 1958).

Even after the entry of judgment in the present case, separate facilities for white and Negro passengers continued to be maintained by all carrier defendants, and racial signs remained posted. The lessees of restaurants at the Jackson Municipal Airport and at the Trailways bus terminal in Meridian, Mississippi, continued to refuse unsegregated service to Negroes.

I

Appellees insist that these practices have now ceased, that all racial signs in and around the facilities of the carrier defendants have now been removed, and that state and municipal segregation laws are no longer enforced. Even assuming this to be so, appellants are entitled to injunctive relief. Notwithstanding the clear pronouncements of the Supreme Court in the present case, 369 U.S. 31, and in *Boynton* v. *Virginia*, 364 U.S. 454 (1960); *Gayle* v. *Browder*, 352 U.S. 903 (1956); and *Morgan* v. *Virginia*, 328 U.S. 373 (1946); of this Court in *Boman* v. *Birmingham Transport Co.*, 280 F. 2d 531 (5th Cir. 1960); *Morrison* v. *Davis*, *supra*; and *Baldwin* v. *Morgan*, *supra*; of the district courts in *United States* v. *City of Montgomery*, 201 F. Supp. 590 (M.D. Ala. 1962); *Brooks* v. *City of Tallahassee*, 202 F. Supp. 56 (N.D. Fla. 1961); and *Lewis* v. *Greyhound Corp.*, 199 F. Supp. 210 (M.D. Ala. 1961); and of the Interstate Commerce Commission in *N.A.A.C.P.* v. *St. Louis S.F. Ry.*, 297 I.C.C. 335 (1955), to name but some of the pertinent cases, appellees continued to maintain their policies and practices of racial segregation. The record here shows that these policies and practices were continued even *after* the entry of judgment by the district court in the present case. The recent statement of this court in *United States* v. *City of Jackson*, *supra*, is pertinent:

> "We again take judicial notice that the State of Mississippi has a steel-hard, inflexible, undeviating official policy of segregation. The policy is stated in its laws. It is rooted in custom. The segregation signs at the terminals in Jackson carry out that policy. The Jackson police add muscle, bone, and sinew to the signs."

——F. 2d at —— (footnotes omitted). See also *Meredith* v. *Fair*, 298 F. 2d 696, 701 (5th Cir.), cert. denied, 371 U.S. 828 (1962).

Under these circumstances, the threat of continued or resumed violations of appellant's federally protected rights,

remains actual. Denial of injunctive relief might leave the appellees "free to return to [their] old ways." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953). "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *United States* v. *Oregon State Medical Soc'y*, 343 U.S. 326, 333 (1952). In the *Grant* case, *supra*, the Court said:

> "Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct. *Hecht Co.* v. *Bowles*, *supra*; *Goshen Mfg. Co.* v. *Myers Mfg. Co.*, 242 U.S. 299 (1916). The purpose of an injunction is to prevent future violations, *Swift & Co.* v. *United States*, 276 U.S. 311, 326 (1928), and, of course, it can be utilized even without a showing of past wrongs. But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation. . . ."

345 U.S. at 633. On the present record, it is clear that such danger exists. *Cf. Derrington* v. *Plummer*, 240 F. 2d 922, 925 (5th Cir. 1956) and cases cited, cert. denied, *sub nom. Casey* v. *Plummer*, 353 U.S. 924 (1957).

II

The decisions of this court are divided on the question of whether appellants have standing to represent not only themselves but the class of all Negroes similarly situated. Fed. R. Civ. P. 23(a). Compare *Shuttlesworth* v. *Gaylord*, 202 F. Supp. 59, 62 (N.D. Ala. 1961), *aff'd sub nom. Hanes* v. *Shuttlesworth*, 310 F. 2d 303 (5th Cir. 1962), and *Derrington* v. *Plummer*, 240 F. 2d 922 (5th Cir. 1956), cert. denied, *sub nom. Casey* v. *Plummer*, 353 U.S. 924 (1957), with *Clark* v. *Thompson*, 313 F. 2d 637 (5th Cir. 1963). The remand by the Supreme Court in the present case would seem to indicate an affirmative answer. The Court specifically noted that this is a class action (369 U.S. at 32),

While it distinguished and denied appellants' attempt to enjoin certain criminal prosecutions against members of a class of which appellants are not members (id. at 33-36)[6] it cited *Evers* v. *Dwyer*, 358 U.S. 202 (1958), also a class action, in remanding the present claims for expeditious disposition. See also *Turner* v. *City of Memphis*, 369 U.S. 350 (1962).

We find it unnecessary to determine, however, whether this action was properly brought under Rule 23(a), for whether or not appellants may properly represent all Negroes similarly situated, the decree to which they are entitled is the same. Appellants do not seek the right to use those parts of segregated facilities that have been set aside for use by "whites only." They seek the right to use facilities which have been *desegregated*, that is, which are open to all persons, appellants and others, without regard to race. The very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of appellants but also for all persons similarly situated.

In *Potts* v. *Flax*, 313 F. 2d 284, 289-90 (5th Cir. 1963), a school segregation case, this Court said:

> "There is at least considerable doubt that relief confined to individual specified Negro children either could be granted or, if granted, could be so limited in its operative effect. By the very nature of the controversy, the attack is on the unconstitutional practice of racial discrimination. Once that is found to exist, the Court must order that it be discontinued. Such a decree, of course, might name the successful plaintiff as the party not to be discriminated against. But that decree may not—either expressly or implicitly—affirmatively authorize continued discrimination by reason of race against others. Cf. *Shelley* v. *Kraemer*, 1948, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161. Moreover, to require a school system to admit the specific successful plaintiff Negro child while others, having no such protection, were required to attend schools

[6] See note 4, *supra*.

in a racially segregated system, would be for the court to contribute actively to the *class* discrimination proscribed by Bush v. Orleans Parish School Board, 5 Cir., 1962, 308 F. 2d 491, 499, on rehearing 308 F. 2d 503; see also Ross v. Dyer, 5 Cir., 1962, 312 F. 2d 191. The effect of this last consideration is to afford additional basis for affirmance. In this light, if it was an error to treat the case as a class suit and enter such a decree, such error, if any, was harmless since the decree for all practical purposes would have been the same had it been confined to the Teal or Flax children."[7]

These principles are fully applicable here.[8]

III

There remains to be considered which defendants shall be enjoined.

To justify the issuance of an injunction against the Attorney General, appellants refer to Patterson's testimony herein that "if conditions arise to such a point that I thought it was necessary to bring them into effect," he would enforce the Mississippi segregation laws. Those laws have now been declared unconstitutional, however, and we cannot assume that the highest legal officer of the state would nevertheless seek their enforcement. Under these circumstances, we cannot say that the denial of injunctive relief against the Attorney General constituted an abuse of discretion. Cf. *Pope v. Ullman*, 367 U.S. 497

[7] In a footnote to its opinion, *id.* at 289, n. 5, the Court said:

"[A]s we recently pointed out, a school segregation suit presents more than a claim of invidious discrimination to individuals by reason of a universal policy of segregation. It involves a discrimination against a *class*, as a class, and this is assuredly appropriate for class relief. Bush v. Orleans Parish School Board, 5 Cir., 1962, 308 F. 2d 491, 499, modified on rehearing, 308 F. 2d 503. See also Ross v. Dyer, 5 Cir., 1962, 312 F. 2d 191."

[8] The cases relied on by the appellees, *Marshall v. Atchison, T. & S.F. Ry.*, 235 U.S. 151 (1914); *Brown v. Board of Trustees*, 187 F. 2d 20 (5th Cir. 1951); and see note 4 *supra*, which denied class relief where plaintiffs were not members of the class for which relief was sought, are obviously beside the point.

(1961); *Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923).

As indicated above we directed in *United States* v. *City of Jackson*, ——F. 2d—— (5th Cir. 1963) that an injunction issue against the City, its Commissioners, and its Chief of Police, all of whom are appellees herein, enjoining the maintenance of racial signs or "otherwise seeking to enforce or encourage racial segregation in the use of the terminal facilities of the carriers." Although the injunction has not yet issued, we assume that persons using the carrier appellees' *terminals* in the exercise of their federal rights will, by its terms, be protected against arrest, harassment, intimidation, threats, or coercion by the City, or its police or other officials. To that extent, the injunction prayed for is unnecessary. The mandate in *United States* v. *City of Jackson*, *supra*, does not relate, however, to persons using the facilities of the Jackson Municipal Airport Authority, or the buses of the bus company appellees. To this extent, we direct that the injunction against the City and appellees Thompson, Lucky, Marshall and Rayfield issue as prayed for.

An injunction shall issue as prayed for against all carrier appellees.[9]

As against Cicero Carr,[10] it appears that further injunctive relief is unnecessary, and the order of August 24, 1962, as affirmed.

Affirmed in part, reversed and remanded in part, for the entry of judgment in accordance with this opinion.

CAMERON, Circuit Judge, Dissenting:

With deference, I dissent from the majority opinion filed in this case.

[9] At the appellate argument, appellants suggested that in addition to the relief prayed for, the decree would require that the waiting rooms formerly set aside for Negroes be closed. Alternatively, it may be appropriate to require appellees to post public signs to the effect that all facilities are now available to all passengers without regard to race. On the present record, however, we can express no opinion on the need for such relief. The question is properly addressed to the sound discretion of the district court.

[10] See note 5 *supra*.

I

I would suggest at the outset that the majority is too much influenced by the decision of this Court in *United States of America and Interstate Commerce Commission* v. *The City of Jackson and its officers*, May 13, 1963, 318 F.2d 1. The specially concurring opinions of Judges Bootle and Ainsworth, in slip opinion of July 18, 1963, tend to limit the broad sweep of the original opinion. For example, in the opinion of Judge Bootle upon rehearing, concurring in the result, it is stated:

> "Upon a more careful study of the opinion in connection with the motion for rehearing, and in view of the opinion's extensive comment and broad treatment I have decided to restrict the scope of my concurrence . . ." Page 3 of the slip opinion. —— F.2d ——

A good portion of the majority opinion in *United States* v. *Jackson*, *supra*, and particularly the "extensive comment and broad treatment" were devoted to dealing with constitutional questions arising under the Fourteenth Amendment and the Commerce Clause. As I understand these opinions, Judges Bootle and Ainsworth have withdrawn their concurrences in the portions of the majority opinion which rested upon constitutional grounds. This would, I assume, eliminate from the opinion in that case some parts which are quoted or relied upon by the majority in the instant case.

In my opinion, the case of *Clark et al* v. *Thompson, Mayor, et al*, U.S. D.C. Southern District of Miss., May 15, 1962, 206 F.Supp. 539,[11] is more nearly in point in our solution

[11] Affirmed in a per curiam opinion by this Court March 6, 1963, where this Court sub nom Rev. L. A. Clark, et al v. Allen C. Thompson, Mayor, et al, 313 F.2d 637, said:

> "In this case the appellants complain of the judgment of the trial court refusing to grant an injunction and denying relief sought by way of declaratory judgment in any alleged class action in which it was claimed that they and others similarly situated were denied the use of public recreational facilities in the City of Jackson, Mississippi solely upon the grounds of race and color. Upon a careful review of the record, we find ourselves in agreement with the conclusions

of the questions discussed in the majority opinion in the case now before us. Here, of course, the court below did enter a declaratory judgment establishing the rights of the parties, merely withholding injunctive relief and retaining jurisdiction for the granting thereof, if it should subsequently turn out to be necessary. What Judge Mize wrote in *Clark* v. *Thompson*, now approved by us by our affirmance of the case and citing the opinion in it as authority, constitutes an excellent statement of the traditional view of the courts towards granting or denial of injunctions and, I think, gives us a good blueprint for action here:

> "This is not a proper class action, and no relief may be granted other than that to which the plaintiffs are personally entitled. Whether this is a proper class action involves a question of fact . . . The plaintiffs cannot make this a legitimate class action by merely calling it such. . . . The burden of proof on this issue was on the plaintiffs. . . . The plaintiffs failed to meet this burden. A class action cannot be maintained where the interests of the plaintiffs are antagonistic to and not wholly compatible with the interests of those whom they purport to represent. . . ." 206 F. Supp. 542.

We omitted from the foregoing quotation the authorities cited. One of them, *Troup* v. *McCart*, 238 F.2d 289, expresses accurately the attitude of this Court in such matters, and clearly supports Judge Mize's findings. We quote further (pages 542-543):

> "Voluntary segregation does not violate the Constitution of the United States which does not prohibit a municipality from permitting, authorizing or encouraging voluntary segregation. . . . [Citing a half column of cases.]
>
> "A desire for a sweeping injunction cannot relieve plaintiffs of the obligation to comply with the general rule that they must present facts sufficient to show

reached by the trial court. Brown v. Board of Trustees of LaGrange Independent School District, 5 Cir., 1951, 187 F.2d 20; Clark et al v. Thompson et al, D.C., 206 F.Supp. 539."

that their individual needs require injunctive relief. . . .

"The Supreme Court of the United States, in the case of Bailey et al v. Patterson et al, 369 U.S. 31, 82 S.Ct 549, 7 L.Ed2d 512, held that the issuance of an injunction was an extraordinary and unusual writ. This, of course, does not announce any new law. The granting of an injunction is discretionary and dependent upon the facts of each case. It should be granted with great caution, care and deliberation on the part of the trier of the facts, and the power to issue injunctions should not be lightly indulged in, but exercised sparingly, after thoughtful deliberation and the presence of an urgent necessity. See 28 American Jurisprudence, Injunctions, Section 25, p. 515. Quoting briefly from that authority, it says down the rule as follows:

"'The relief should be awarded only in clear cases, reasonably free from doubt, and when necessary to prevent great and irreparable injury.' . . .

"The individual defendants in this case are all outstanding, high class gentlemen and in my opinion will not violate the terms of the declaratory judgment issued herein. They known now what the law is and what their obligations are, and I am definitely of the opinion that they will conform to the ruling of this Court without being coerced so to do by an injunction. The City of Jackson, a municipality, of course is operated by some of these high class citizens. I am further of the opinion that during this period of turmoil the time now has arrived when the judiciary should not issue injunctions perfunctorily, but should place trust in men of high character that they will obey the mandate of the Court without an injunction hanging over their heads.

"Neither the facts in the present case nor the exigencies of the situation are sufficient or urgent enough to require the granting of an injunction. . . ."

II

In the action taken by Judge Mize in the *Clark* case and in the language he used, the highest traditions of equity were, in my opinion, exemplified. Obedience of the law and of the will of the Court were accomplished without needless harassment, without classifying the defendants as persons who would not obey the law unless forced to do so. A judge in a criminal case exercises the same wise discretion when, the facts justifying, he defers sentence upon one charged with having transgressed the law.

We have a like situation before us here. There are no citizens anywhere, including the individuals and the corporations, of greater integrity or dependability. The Judge who tried this case labored over it a long time and on many different occasions. After he had made his findings of fact and conclusions of law, he permitted the appellants to reopen the case as many times as they desired to raise questions of law and to supplement the facts by affidavit or other means of proof. He modified his findings and conclusions on more than one occasion. These supplementary proceedings occupy one whole volume of the record. Counsel were given full opportunity to differentiate and discuss all of the recent holdings of the Supreme Court.

As an illustration, one party argued that the language of the Supreme Court in its decision of this *(Bailey v. Patterson)* case, quoted from by the majority opinion, indicated inferentially the attitude of the Supreme Court as favoring what the majority has now decided. The other party was heard to take the attitude illustrated by this quotation from the supplemental hearing:

> "In this case, the Court [Supreme] said this: '. . . remand the case for expeditious disposition in the light of this opinion of appellant's claims of rights to unsegregated transportation service.' Compare that with the language of the remand in the Turner v. Memphis case. There the Supreme Court said 'The case is remanded to the District Court with directions to enter a decree granting appropriate

injunctive relief against the discrimination complained of."

The trial court manifestly thought, from everything that transpired in court, from the demeanor of counsel and of the parties, that the appellees were merely urging upon it legitimate contentions as to the law and the fact; and, after all of the voluminous arguments, it entered this decree:

> "It Is Ordered, Adjudged and Declared as follows, to-wit:
>
> "(a) That each of the three plaintiffs has a right to unsegregated service from the restaurant at the airport.
>
> "(b) That defendant Cicero Carr, should not have any interest in or control over the restaurant facilities and the Jackson Airport in the future and should not be employed in any capacity in the operation of said facilities.
>
> "(c) That the plaintiffs are not now entitled to any injunctive relief, but jurisdiction over this action and each of the defendants is hereby retained for the entry of such further orders and relief as may be subsequently appropriate."

The trial court entered this order after finding categorically and in detail that everything complained of by the appellants had been corrected and that there will be no re-occurrence of same; that the parties had been fully advised what the law required of them and that an injunction was unnecessary.

III

This action of the court below comes to us, I submit, with an unusual presumption of correctness and an unusual call upon us to sustain the trial court's findings, conclusions and orders. Certainly the appellees had a right to contest all of the claims made by the appellants and to present their views fully and with all proper vigor. The

appellants won their case and the appellees were taxed with costs in the court below. Their rights have been declared. The choice of means by which the court's will should be enforced belonged, under our system, to the trial judge. He it is who knows local conditions and who must live with and enforce the law as he has declared it.

Something is said in the majority opinion about our knowing certain things judicially. Certainly we do not know them as well as does the judge below who has spent all of his days in the State of Mississippi and in close contact with the problems presented in this case. Should compliance with the law as it has been declared be enforced by the methods chosen by the District Courts or by more drastic methods which we might have invoked if we had been sitting in his place? For my part, I think the answer to that is clear. I would support the judge in the field who knows the facts and knows best how obedience to the law and the mandate of the court can be accomplished. I think the law requires us, under the facts of this case, to support and affirm the action of the lower court.

Judge Gewin has stated much better than I can, the attitude I think we, as an appellate court, should take in this case. The problems before the Court were much like those facing us here; and I adopt what he said in his dissenting opinion in No. 20501, *W. G. Anderson et al* v. *City of Albany et al*, July 26, 1963, ——F.2d——.

I respectfully dissent.

A true copy

Test: Edward W. Wadsworth,
Clerk, U. S. Court of Appeals, Fifth Circuit.

By Clara R. James,
Deputy.

New Orleans, Louisiana, November 29, 1963.

APPENDIX "L"

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October Term, 1962

No. 20,372

D. C. Docket No. 3133 Civil

SAMUEL BAILEY, ET AL., *Appellants*,

versus

JOE T. PATTERSON, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, ET AL., *Appellees*.

Appeal from the United States District Court for the Southern District of Mississippi

Before CAMERON, WISDOM and HAYS,* Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part in accordance with the opinion of this Court, and that this cause be, and it is hereby, remanded in part to the said District Court for the entry of judgment in accordance with said opinion;

It is further ordered and adjudged that the appellees, City of Jackson, Thompson, Lucky, Marshall and Rayfield, and the carrier appellees, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Cameron, Circuit Judge, Dissents"

September 24, 1963

Issued as Mandate:

---

*Of the Second Circuit, sitting by designation.

APPENDIX "M"

U. S. Court of Appeals Filed Nov. 8, 1963. Edward W. Wadsworth, Clerk

(614) IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 20372

SAMUEL BAILEY, ET AL, *Appellant*,

v.

JOE T. PATTERSON, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, ET AL, *Appellee*.

Appeal from the United States District Court for the Southern District of Mississippi

(Nov. 8, 1963)

ON PETITION FOR REHEARING

Before CAMERON, WISDOM and HAYS,* Circuit Judges.

PER CURIAM:

It is ordered that the petition for rehearing in the above entitled and numbered cause is hereby DENIED.

---

* Of the Second Circuit, sitting by designation.

APPENDIX "N"

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 20372

SAMUEL BAILEY, ET AL., *Appellant*,

versus

JOE T. PATTERSON, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, ET AL., *Appellee*.

ON CONSIDERATION OF THE APPLICATION of the Appellees in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable Appellees to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of 60 days, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within 60 days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of 60 days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

DONE AT NEW ORLEANS, LA., THIS 15th day of November, 1963.

/s/ PAUL R. HAYS,
United States Circuit Judge.

(ORIGINAL FILED—November 18, 1963.)

APPENDIX "O"

Segregation Statutes of Mississippi

§2351. Railroads—not providing separate cars.

If any person or corporation operating a railroad shall fail to provide two or more passenger cars for each passenger train, or to divide the passenger cars by a partition, to secure separate accommodations for the white and colored races, as provided by law, or if any railroad passenger conductor shall fail to assign each passenger to the car or compartment of the car used for the race to which the passenger belongs, he or it shall be guilty of a misdemeanor, and, on conviction shall be fined not less than twenty dollars nor more than five hundred dollars.

§2351.5 Railroads and other carriers to provide separate toilet facilities for the races traveling in intrastate travel.

Every railroad company, bus company or other common carrier for hire owning, maintaining or operating a passenger depot, bus station, or terminal where a waiting room for passengers is maintained and operated shall cause to be constructed and maintained in connection with such reception or waiting room two closets or retiring or rest rooms to be exclusively used by white passengers in intrastate commerce arriving and departing from such depot, bus station or terminal and the following notice shall be painted or shown in bold letters on the door of one: "Rest room; white female only in intrastate travel," and on the other: "Rest room, white male only in intrastate travel;" and likewise two closets or retiring or rest rooms shall be constructed and maintained for colored passengers in intrastate travel with like signs painted or shown in bold letters on the doors thereof, substituting the word "colored" for "white," and such owner or operator shall see that the closets or rest rooms are equally clean and in equally good sanitary condition.

No white person shall enter, frequent, occupy or use

the colored closets or rest rooms required by this act, and no colored person shall enter, frequent, occupy or use the white closets or rest rooms required by this act, except, however, regularly employed persons of the owner or operator of the passenger depots, bus stations or terminals may enter such closets or rest rooms in the discharge of their assigned duties.

Any person violating the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars ($1,000.00) or confined in jail for more than one year, or both.

2351.7 Persons traveling in intrastate travel by carrier required to use waiting room designated for their race—penalty for violation.

1. Any person traveling in intrastate travel by rail, bus, airline or other common carrier for hire who knowingly or wilfully enters or attempts to enter the waiting room not marked and provided for persons other than his or her race as required by law, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars ($1,000.00) and imprisoned in jail not more than sixty (60) days, or both such fine and imprisonment.

2. No white person shall enter, frequent, occupy or use the colored waiting room of any depot, bus station or terminal when such waiting room is marked in bold letters as required by law; and no colored person shall enter, frequent, occupy or use the white waiting room of any depot, bus station or terminal when same is marked in bold letters as required by law, except, however, regularly employed persons of the owner or operator of depots, bus stations or terminals may enter same in the discharge of their assigned and required duties.

Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars ($1,000.00) and imprisonment in jail for not more than one year, or both.

3. No action or suit in law or in equity may be brought

in any court of this state against any law enforcement officer for damages for false arrest of any passenger because of a violation of this act, nor shall any common carrier or passengers, or its employees be subject to suit for damages on account of such common carrier of passengers or its employees complying with the provisions of this act.

4. In the event any part or parts of this act shall be held unconstitutional, the remaining portion of this act shall remain in full force and effect:

§7784. Equal but separate accommodations for the races.

Every railroad carrying passengers in this state shall provide equal but separate accommodations for the white and colored races by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition to secure separate accommodations; and the conductor of such passenger train shall have power, and is required, to assign each passenger to the car, or the compartment of a car, used for the race to which such passenger belongs; and should any passenger refuse to occupy the car to which he or she is assigned by the conductor, the conductor shall have power to refuse to carry such passenger on the train, and for such refusal neither he nor the railroad company shall be liable for damages in any court.

§7786. Passengers required to occupy compartments to which they are assigned.

The operators of such street cars and street buses and motor vehicles, as defined by chapter 142 of the laws of 1938 [§§ 7632-7687, Code of 1942] shall have power and are required to assign each passenger to the space or compartment used for the race to which such passenger belongs. Any passenger undertaking or attempting to go into the space or compartment to which by race he or she does not belong shall be guilty of a misdemeanor, and, upon conviction, shall be liable to a fine of twenty-five dollars ($25.00) or, in lieu thereof, by imprisonment for a period

of not more than thirty (30) days in the county jail; and any operator of any street car or street bus or motor vehicle as herein defined, assigning or placing a passenger to the space or compartment other than the one set aside for the race to which said passenger belongs shall be guilty of a misdemeanor and, upon conviction, shall be liable to a fine of twenty-five dollars ($25.00) or, in lieu thereof, to imprisonment for a period of not more than thirty (30) days in the county jail.

§7786-01. Penalty for violation.

Every person or corporation operating street railways and street or municipal buses, carrying passengers in this state, and every common carrier of passengers in this state by motor vehicle, as defined by section 3(e) of chapter 142, of the laws of 1938 [§ 7634, Code of 1942], guilty of wilful and continued failure to observe or comply with the provisions of this act shall be liable to a fine of twenty-five dollars ($25.00) for each offense, and each day's violation of the provision hereof shall constitute a separate violation of this act; provided, however, that in the case of persons or corporations operating street railways and street or municipal buses, the fine shall be ten dollars ($10.00) instead of twenty-five dollars ($25.00).

APPENDIX "P"

AN ORDINANCE REQUIRING COMMON CARRIERS OF PERSONS TO MAINTAIN IN THE CITY OF JACKSON SEPARATE WAITING ROOM AND REST ROOM ACCOMMODATIONS AND FACILITIES FOR THE WHITE AND COLORED RACES; MAKING IT UNLAWFUL FOR ANY PERSON OF THE WHITE RACE TO USE SUCH ACCOMMODATIONS AND FACILITIES DESIGNATED AND SET APART FOR PERSONS OF THE COLORED RACES; MAKING IT UNLAWFUL FOR ANY PERSON OF THE COLORED RACES TO USE SUCH ACCOMMODATIONS AND FACILITIES DESIGNATED AND SET APART FOR PERSONS OF THE WHITE RACE; PRESCRIBING PENALTY FOR VIOLATION HEREOF; AND MAKING THIS ORDINANCE IMMEDIATELY EFFECTIVE.

WHEREAS, the citizens of the City of Jackson, Mississippi, have been accustomed for many generations to separation of the White race from the Colored races in the use of waiting room and rest room facilities and accommodations provided by common carriers of persons; and

WHEREAS, a sudden intermingling of the races necessarily involved in the common use of such waiting room and rest room accommodations and facilities would likely result in disturbances, breaches of the peace, disorder and confusion; and

WHEREAS, the Council of the said City of Jackson owes the duty to its citizens, regardless of race, color, creed or station in life, to maintain good order and to prevent breaches of the peace, and thereby to promote the health and general welfare of all its citizens, and it has power to adopt and enforce ordinances to accomplish such purposes;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF JACKSON, MISSISSIPPI:

SECTION 1. That all common carriers of persons which have heretofore provided and maintained separate waiting rooms, rest rooms and like accommodations and facilities be and they are hereby required to continue to maintain similar but separate waiting rooms, rest rooms and like accommodations and facilities for the White and for the Col-

ored races, and to appropriately designate one of the said waiting rooms, rest rooms, accommodations and facilities for use by persons of the White race only, and the other for use of persons of the Colored race only.

SECTION 2. That it shall be unlawful for any person of the White race to use as such the said accommodations so thus provided for use by persons of the Colored races only.

SECTION 3. That it shall be unlawful for any person of the Colored races to use as such the said accommodations so thus provided for use by persons of the White race only.

SECTION 4. That any person convicted of a violation of this ordinance shall be guilty of a misdemeanor and shall be punished by a fine of not less than twenty-five dollars ($25.00), nor more than one hundred dollars ($100.00), or by imprisonment in the City Jail not to exceed thirty (30) days, or by both such fine and imprisonment.

SECTION 5. It having been found by the Council of the said City of Jackson, Mississippi, that in the preservation of good order and peace of the municipality, and in the promotion of the general welfare of its citizens, it is necessary for this ordinance to become immediately effective, and the same having been adopted by the unanimous vote of all the members of the governing body of said city, it is further ordained that this ordinance shall be and become effective immediately.

APPROVED:

ALLEN C. THOMPSON,
Mayor.

C. W. ALEXANDER,
Commissioner.

D. L. LUCKEY,
Commissioner.

ATTEST:

MRS. J. R. SKINNER,
City Clerk. (SEAL.)

I, Mrs. J. R. Skinner, the duly appointed, qualified and acting City Clerk and lawful custodian of the minutes of the

Council and seal of said city, certify that the forgoing is a true and exact copy of an Ordinance passed by the City Council at its regular meeting on January 12, 1956, and recorded in Minute Book "F", page 149.

WITNESS my signature and official seal of office, this 12th day of January, 1956.

EXHIBIT PLAINTIFFS 31.

WITNESS, ——, ——.

MRS. J. R. SKINNER,
City Clerk.

(SEAL.)

September 26, 1961.

APPENDIX "Q"

BREACH OF THE PEACE STATUTES OF THE STATE OF MISSISSIPPI

2087.5. Disorderly conduct—may constitute felony, when.

1. Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby:

(1) crowds or congregates with others in or upon shore protecting structure or structures, or a public street or public highway, or upon a public sidewalk, or any other public place, or in any hotel, motel, store, restaurant, lunch counter, cafeteria, sandwich shop, motion picture theatre, drive-in, beauty parlor, swimming pool area, or any sports or recreational area or place, or any other place of business engaged in selling or serving members of the public, or in or around any free entrance to any such place of business or public building, or to any building owned by another individual, or a corporation, or a partnership or an association, and who fails or refuses to disperse and move on, or disperse or move on, when ordered so to do by any law enforcement officer of any municipality, or county, in which such act or acts are committed, or by any law enforcement officer of the State of Mississippi, or any other authorized person, or

(2) insults or makes rude or obscene remarks or gestures, or uses profane language, or physical acts, or indecent proposals to or toward another or others, or disturbs or obstructs or interferes with another or others, or

(3) while in or on any public bus, taxicab, or other vehicle engaged in transporting members of the public for a fare or charge, causes a disturbance or does or says, respectively, any of the matters or things mentioned in subsection (2) supra, to, toward, or in the presence of any other passenger on said vehicle, or any person outside of said vehicle or in the process of

boarding or departing from said vehicle, or any employee engaged in and about the operation of such vehicle, or

(4) refusing to leave the premises of another when requested so to do by any owner, lessee, or any employee thereof,

shall be guilty of disorderly conduct, which is made a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than two hundred dollars ($200.00), or imprisonment in the county jail for not more than four (4) months, or by both such fine and imprisonment; and if any person shall be guilty of disorderly conduct as defined herein and such conduct shall lead to a breach of the peace or incite a riot in any of the places herein named, and as a result of said breach of the peace or riot another person or persons shall be maimed, killed or injured, then the person guilty of such disorderly conduct as defined herein shall be guilty of a felony, and upon conviction such person shall be imprisoned in the Penitentiary not longer than ten (10) years.

2. The provisions of this act are supplementary to the provisions of any other statute of this state.

3. If any paragraph, sentence, or clause of this act shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision of this act, but such other part shall remain in full force and effect.

2087.7. Disorderly conduct—interference with business; customers, invitees, etc.

1. It shall be unlawful for any person or persons, while in or on the premises of another, whether that of an individual person, or a corporation, or a partnership, or an association, and on which property any store, restaurant, sandwich shop, hotel, motel, lunch counter, bowling alley, moving picture theatre or drive-in theatre, barber shop or beauty parlor, or any other lawful business is operated which engages in selling articles of merchandise or services or accommodation to members of the public, or engages

generally in business transactions with members of the public, to:

(1) prevent or seek to prevent, or interfere with, the owner or operator of such place of business, or his agents or employees, serving or selling food and drink, or either, or rendering service or accommodation, or selling to or showing merchandise to, or otherwise pursuing his lawful occupation or business with, customers or prospective customers, or other members of the public who may then be in such building, or

(2) prevent or seek to prevent, or interfere with, or seek to interfere with, other persons, expressly or impliedly invited upon said premises, or prospective customers, coming into or frequenting such premises in the normal course of the operation of the business conducted and carried on upon said premises,

shall be guilty of disorderly conduct, a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars ($500.00), or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment.

2. The provisions of this act are supplementary to the provisions of any other statute of this state.

3. If any paragraph, sentence, or clause of this act shall be held to be unconstitutional, or invalid, the same shall not affect any other part, portion or provision thereof, but such other part shall remain in full force and effect.

2089.5 Disturbance of the public peace, or the peace of others.

1. Any person who disturbs the public peace, or the peace of others, by violent, or loud, or insulting, or profane, or indecent, or offensive, or boisterous conduct or language, or by intimidation, or seeking to intimidate any other person or persons, or by conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace, or by any other act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five

hundred dollars ($500.00), or by imprisonment in the county jail not more than six (6) months, or both.

2. The provisions of this act are supplementary to the provisions of any other statute of this state.

3. If any paragraph, sentence or clause of this act shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision thereof, but such other part shall remain in full force and effect.

APPENDIX "R"

MISSISSIPPI STATUTES RE: MUNICIPAL AIRPORT AUTHORITY

"7545-32. Creation of municipal airport authority.

Any municipality may, by resolution, create a public body corporate and politic to be known as a municipal airport authority, which shall be authorized to exercise its functions upon the appointment and qualification of the first commissioners thereof. Upon the adoption of a resolution creating a municipal airport authority, the governing body of the municipality shall, pursuant to the resolution, appoint five (5) persons as commissioners of the authority. . . ."

"7545-36. Commissioners—compensation—meetings—officers.

The powers of each authority shall be vested in the commissioners thereof. A majority of the commissioners of an authority shall constitute a quorum for the purpose of conducting the business of the authority and exercising its powers and for all other purposes. Action may be taken by the authority upon a vote of not less than a majority of the commissioners present. . . ."

7545-37. General powers of an authority.

An authority shall have all the powers necessary or convenient to carry out the purposes of this act (excluding the power to levy and collect taxes or special assessments) including, but not limited to, the power:

(a) To sue and be sued; to have a seal, and to have perpetual succession;

(b) To execute such contracts and other instruments and take such other action as may be necessary or convenient to carry out the purposes of this act;

(c) To plan, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, and protect airports and air navigation facilities, within this state and

within any adjoining state, including the acquisition, construction, installation, equipment, maintenance, and operation of such airports or buildings and other facilities for the servicing of aircraft or for the comfort and accommodation of air travelers, and the direct purchase and sale of supplies, goods, and commodities as are incident to the operation of its airport properties, without having to make purchases thereof through the municipal governing authorities. For such purposes an authority may, by purchase, gift, devise, lease, eminent domain proceedings or otherwise, acquire property, real or personal, or any interest therein, including easements in airport hazards or land outside the boundaries of an airport or airport site, as are necessary to permit the removal, elimination, obstruction-marking, or obstruction-lighting of airport hazards or to prevent the establishment of airport hazards. . . ."

(9488-8)

Office Supreme Court, U.S.
FILED
JAN 22 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 708

JOE T. PATTERSON, *et al.*,

Petitioners,

—v.—

SAMUEL BAILEY, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

JACK GREENBERG
CONSTANCE BAKER MOTLEY
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In the

Supreme Court of the United States

October Term, 1963

No. 708

Joe T. Patterson, *et al.*,

Petitioners,

—v.—

Samuel Bailey, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit is printed in the appendix to the petition for certiorari and has been reported at 323 F. 2d 201. Earlier opinions by the District Court and by this Court are also printed in the appendix to the petition for certiorari.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Whether the court below correctly found that Negro respondents, forced by petitioners' laws and policies to use segregated public travel facilities, were entitled to injunctive relief against such laws and policies for themselves and for other Negroes similarly situated.

Statement

Respondents are Negro citizens of Mississippi who have experienced racial segregation while using public travel facilities in Mississippi, and seek injunctive relief against such discriminatory travel practices for themselves and for all Negroes similarly situated (R. Vol. I, 109, 121-141).

Petitioners, the City of Jackson, its mayor, commissioners and police chief, and the Jackson Municipal Airport Authority, seek review of the lower court's decision granting this relief as directed by the mandate of this Court.[1]

When this suit was filed in June 1961, racial segregation was required in the City of Jackson by an Ordinance enacted in 1956 (R. Vol. II, 348, 351-52), pursuant to which segregation of Negroes and whites was required in local terminals (R. Vol. II, 359), including the Jackson Airport where the Municipal Authority operated segregated restrooms, water fountains (R. Vol. I, 101, Vol. II, 232), and permitted the lessee of its restaurant to discriminate against Negro patrons (R. Vol. II, 210-212, 237).

The three-judge district court which originally heard the case having ruled 2-1 on November 17, 1961, to invoke the doctrine of federal abstention (199 F. Supp. 595), an appeal was taken to this Court which on February 26, 1962, in a *per curiam* opinion, vacated and remanded the case to the district court "for expeditious disposition of appellants' claims of right to unsegregated transportation service." 369 U. S. 31, 34.

On remand, the district judge declared the statutes and ordinance requiring segregated travel unconstitutional, held

[1] The other defendant appellees, including the State of Mississippi, the Illinois Central Railroad, Continental Southern Lines (Trailways), Southern Greyhound Lines and the Jackson City Lines did not join in the petition for writ of certiorari.

each of the respondents entitled to unsegregated transportation service, but held that the suit was not a proper class action, and that no injunction was required (R. Vol. IV, 740-41). Respondents tried three times to obtain an injunction, presenting on each occasion proof that petitioners were continuing to require segregation in travel facilities (R. Vol. V, 754-784, 793-812). The district court refused this relief (R. Vol. V, 848-49), and respondents appealed (R. Vol. V, 852).

The court of appeals found that respondents have standing to represent all Negroes similiarly situated, relying on this Court's decision in this case (369 U. S. 31), and its own precedent. It also found respondents entitled to injunctive relief against petitioners and the carriers. Petitioners having been enjoined in *United States* v. *City of Jackson*, 318 F. 2d 1 (5th Cir. 1963) from maintaining facial segregation in the carriers, or in or around their terminals by the maintenance of racial signs or otherwise, city officials were enjoined in this case from maintaining similar policies in the facilities of the Jackson Municipal Airport and the City Bus Lines. Petitioners were also enjoined from continuing to arrest, harass, intimidate, threaten, or coerce respondents or the members of their class in the exercise of their federally protected rights (Appendix, p. 95). On petitioners' motion, the court below stayed its mandate to permit the filing of their petition for a writ of certiorari (Appendix, p. 97).

ARGUMENT

The Court of Appeals Decision That Injunctive Relief for Respondents and Their Class Was Necessary to Insure Effective Protection of Their Constitutional Right to Nonsegregated Travel Is Clearly Correct Under This Court's Mandate and Fifth Circuit Decisions.

Petitioners seek review of the court of appeals decision which granted respondents the relief against racial segregation to which this Court has expressly found they were entitled.

After reviewing the record in this case, this Court held in its *per curiam* opinion, 369 U. S. 32, 33, that:

> "... as passengers using the segregated transportation facilities they are aggrieved parties and have standing to enforce their rights to nonsegregated treatment. Mitchell v. United States, 313 U. S. 80, 93, 85 L. ed. 1201, 1210, 61 S. Ct. 873; Evers v. Dwyer, 358 U. S. 202, 3 L. ed. 2d 222, 79 S. Ct. 178."

But, notwithstanding the remand of the case "for expeditious disposition, in light of this opinion, of the appellants' claims of right to unsegregated transportation service", the district court ruled that the action was not a class action, refused to grant any injunctive relief, and persisted in this refusal in the face of further proof that petitioners were continuing their outlawed policy.

Petitioners first contend that the lower court's finding that respondents were entitled to obtain relief on behalf of other Negro travellers creates a serious conflict with this Court's decision in *McCabe v. Atchison, T. & S. F. R. Co.*, 235 U. S. 151 (1914), and decisions of the courts of appeal.

No such conflict exists. This Court referred to the *McCabe* case, *supra*, in finding respondents lacked standing to enjoin criminal prosecutions for breach of the peace used by petitioners to enforce segregation policies. But, having noted that respondents sought relief "on behalf of themselves and others similarly situated, . . ." this Court expressly found that they had standing to enforce their rights to nonsegregated treatment in public travel facilities.

This finding, the court of appeals concluded, settled the division in the Fifth Circuit recently created by the decision in *Clark* v. *Thompson*, 313 F. 2d 637 (5th Cir., 1963), cert. denied, 11 L. ed. 2d 312 (1964), which appeared to depart from the generally accepted rule in civil rights cases that persons in the position of respondents have standing to represent not only themselves but the class of all Negroes similarly situated. Fed. Rule Civ. Proc. 23(a)(3). *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Shuttlesworth* v. *Gaylord*, 202 F. Supp. 59, 62 (N. D. Ala. 1961), aff'd *sub nom. Hanes* v. *Shuttlesworth*, 310 F. 2d 303 (5th Cir. 1962); *Derrington* v. *Plummer*, 240 F. 2d 922 (5th Cir. 1956), cert. denied, *sub nom. Casey* v. *Plummer*, 353 U. S. 924 (1957).

But the court, applying the reasoning in one of its school desegregation cases, *Potts* v. *Flax*, 313 F. 2d 284 (5th Cir. 1963), found it unnecessary to determine the class action issue, because respondents seek the right to use desegregated travel facilities, i.e., facilities open to all without regard to race, and not merely the right to use those segregated facilities set aside for "whites". Thus, said the court below: "the very nature of the right appellants seek to vindicate requires that the decree run to the benefit not only of appellants but also for all persons similarly situated."

This decision is not only clearly correct but also necessary if respondents and other civil rights plaintiffs are to obtain more than pyrrhic victories in return for their efforts to end state-sanctioned racial segregation. The Fourth Circuit agrees. *Brunson* v. *Board of Trustees of Clarendon County*, 311 F. 2d 107 (4th Cir. 1962). That Circuit's decision in *Dawley* v. *City of Norfolk*, 260 F. 2d 647 (4th Cir. 1958), cited by petitioners, is not in point since there the court found that the theory of the plaintiff, a Negro attorney, that racial designations on State courthouse restrooms influenced potential clients in a manner detrimental to his economic interests should be brought in the state court.

Nor is it possible to distinguish *Evers* v. *Dwyer*, 358 U. S. 202 (1958); *Turner* v. *City of Memphis*, 369 U. S. 350 (1962) and Fifth Circuit decisions in *Hanes* v. *Shuttlesworth*, *supra*, and *Derrington* v. *Plummer*, *supra*, on the ground that the plaintiffs in each had requested and been refused desegregated accommodations. Respondents had each traveled on public conveyances and been required to submit to the segregation policy required by petitioners. One of them had written letters complaining about such policies (R. Vol. I, 96-99). No more was required of them. *Evers* v. *Dwyers*, *supra*; *Baldwin* v. *Morgan*, 251 F. 2d 780, 787 (5th Cir. 1958).

The decision below is not novel, as petitioners contend. It establishes no new right under the Fourteenth Amendment, and the many decisions on standing cited by petitioners cannot shake the clearly correct holding of this Court and the court below.

Petitioners also complain that there was no basis to support the lower court in enjoining them from enforcing laws and policies requiring segregation in travel facilities. They refer to many cases reflecting judicial reluctance to grant

injunctions because of mere apprehension, suspicion or fear of need, and to the trial court's belief that City officials would conform to the court's rulings without an injunction.

But the injunctive relief ordered by the court below, after finding that petitioners had disregarded several federal court decisions invalidating their segregation practices and policies, and that the State of Mississippi has not altered its "steel-hard, inflexible, undeviating, official policy of segregation", is in line with the decisions of this Court. *United States v. W. T. Grant*, 345 U. S. 629, 632 (1953); *United States v. Oregon State Medical Society*, 343 U. S. 326, 333 (1952).

Petitioners assert that the court of appeals could not enjoin the enforcement of their breach of the peace statutes (Appendix, p. 105), relying primarily on *Douglas v. Jeannette*, 319 U. S. 157 (1943), which, of course, concerned an effort to enjoin pending state prosecutions that this Court found were undertaken "lawfully and in good faith", 319 U. S. at 164, and secondarily on the argument (Petition, p. 27) that any person arrested under these statutes will have their day in court and will have, if they desire, an opportunity to appeal to this Court. Whatever solace this promise may bring to the hundreds of "Freedom Riders" whose convictions for Breach of Peace have been on appeal in Mississippi courts since the Summer of 1961, it cannot obscure the fact that here, respondents, having shown that these statutes have consistently been used by petitioners to arrest persons seeking to use travel facilities on a desegregated basis, did bring their case to this Court, and have now received appropriate relief in accordance with this Court's mandate.

Finally, the argument, based on a footnote in *Monroe v. Pape*, 365 U. S. 167, 191 (1961), that the City of Jackson and the Municipal Airport Authority are public bodies,

and neither is a "person" under 28 U. S. C., (1343(3) and 42 U. S. C., 1983, is not new. The identical position was taken by petitioners in a motion to dismiss discussed by Judge Rives in his dissent from the three-judge court decision in this case. (Appendix p. 38). Respondents submit that Judge Rives' position that this Court did not intend in *Monroe v. Pape* to overrule prior cases indicating that a municipal corporation may be sued for equitable relief, as in *Holmes v. City of Atlanta*, 350 U. S. 879 (1955) is correct.

In summary, petitioners raise no novel issues, reveal no conflict in decisions, and seek review of a lower court decision that complies with the mandate of this Court, accords with other applicable rulings, and provides respondents with relief indispensible to the exercise of their right to use public travel facilities in Mississippi on a desegregated basis.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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